Personnel Policies and Practices: Understanding Employment Law

Charter Friends

National Network

Produced under a grant from the Annie E. Casey Foundation

November 2000

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The **Charter Friends National Network (CFNN)** is a project of the Minnesota-based Center for Policy Studies in cooperation with Hamline University. Founded in early 1997, CFNN's mission is to connect and support state-level charter school organizations – mainly non-profit resource centers and associations of charter school operators.

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I. Introduction – Including A Brief History of Employment Law and Practice

When the oldest author of this handbook was going to law school – graduating in 1978 – there were no courses in "employment law." Legal digests and encyclopedias did not mention "employment," but instead, "Master and Servant." Labor law was treated as its own, rather arcane, subject. Some law schools had just begun offering employment discrimination courses. It was not that employment lacked an interesting, complex legal history – quite the opposite. But outside specialized areas – unionized work places, civil service systems, workers compensation and the nascent subject of discrimination – employees had few rights. Thus, the lawyers who found fruitful labor representing employees or, for that matter, employers, were for the most part specialists in some narrow field.

All of this has changed. "Master and Servant" has disappeared. Employment Law is a popular law school course. Employment Discrimination is often offered as a second course. Labor Law comes in a distant third. The portion of the private work force that is unionized has plummeted; it is now below 10% for the first time since the 1920s. Theories of employee involvement use of self-managing work teams, expanded reliance on temporary or contingent workers, and a dozen other developments – often seeming to contradict each other – have rippled through the human resource profession. And alongside these changes, what many view as the relentless legalization of the employment relationship has proceeded apace. Though the full story or stories are beyond the scope of this volume, the reader of this manual should begin with the realization that this area of law has emerged recently and grows with each passing day. The summary that follows may be of interest to those with a historical bent. Those focused on the nuts and bolts of employment law can skip to *The Structure of This Manual* at the close of the introduction.

Individual Employment Rights

Under English common law hiring was presumed to be for a term of one year unless there was cause for early termination. American court decisions imported English practice. Then, in 1886, a law professor's error created- the predominant legal doctrine in employment for the next 100 years. H.G. Wood's *Master and Servant* declared that the American rule had always been that employment was

"at-will" – terminable for any reason at any time. Wood was wrong, but at the right time. The doctrine of employment-at-will swept through American courts. Over time, pure at-will employment was eroded by statutory developments – collective bargaining, anti-discrimination laws, and so on – but remained the unquestioned "common law" rule until 1978. That year, the New Hampshire Supreme Court became the first state court to critically reconsider the doctrine. Since 1978, virtually every state supreme court has spoken on whether or to what extent "employment at will" is still the law of that state.

Public Employment, the "Spoils" System and the Civil Service

By the 1840s public officials had developed the so-called "spoils" or "rotation" system. This system held that electoral victory allowed elected officials to sweep the employees previously hired by a defeated politician out of office and replace them with supporters, relatives and friends. These people, naturally, would offer political support to help their patron remain in office. Attempts to correct abuses of the "spoils" system began with the Pendleton Act of 1883. This law required competitive hiring, but did not regulate firing or coercing support. In 1912 Congress reacted to "gag orders" issued by Presidents Roosevelt and Taft by creating the first real civil service system for federal employees, limiting the nearly absolute powers of Presidents and other managers. Similar reforms passed during this same period in many states. From the 1950s to the 1970s the Supreme Court redefined the "due process" implications of civil service protection.

Unions, Strikes and Collective Bargaining

Typically employers have superior bargaining power – a point first noted by Adam Smith. Employees have long tried to overcome this disadvantage by combining or unionizing. The 19th century saw two major union movements – for the ten-hour and then the eight-hour day – gain legislative victories that were then lost during economic crises. The next two labor movements thought the lesson was not to use legislation. The Knights of Labor were drawn to conspiracy and violence and did not survive. The American Federation of Labor (AFL) pioneered collective bargaining in both the public and private sectors.

During World War I, employers and labor accepted an extraordinary degree of federal regulation. Wages were held down though demand was high. Pent up expectations exploded when the

war ended. A wave of strikes shook the country from 1919 to 1920. One turning point was the Boston Police Strike of 1920. Governor Calvin Coolidge broke the strike and the police union. He declared that there was no right of public employees to strike "against government." For the first time, a strong distinction was drawn between private sector and public sector unionism. After the 1919-20 strike wave, public sector unions almost disappeared and the AFL as a whole lost ground. As the 1920s unfolded "company unions" and similar schemes became widespread, but following the crash of 1929 most of these non-union systems fell apart. With the Great Depression, unionism re-emerged with a vengeance and a new concept of organizing – proceeding plant-by-plant through an entire industry – grew into a new organization, the Congress of Industrial Unions. By the end of World War II over 40 percent of private sector employees belonged to unions. After the War, public sector unionism began to revive, most dramatically in the 1960s and 1970s.

A decline in private sector unionism began with the oil shocks of 1973. In public imagination, the loss of union power was symbolized by President Reagan breaking the air traffic controllers' strike in 1981. By the late 1980s, union density was in free fall. Employer-designed representation schemes, reminiscent of the company union, re-emerged. Contingent and temporary employment increased.

Labor Law

The early American law of collective bargaining followed a fitful course. The earliest American case – concerning the Philadelphia Cordwainers' (shoemakers) strike of 1807 – found unionization and striking to be illegal. This lower court decision was widely reported, but controversial. A contrary decision from the Massachusetts Supreme Court came in 1842. During a wave of strikes against bankrupt railroads in 1877, judges began using injunctions to regulate labor protests. As a result, strikes could be found "legal," but striker tactics so limited by court order that the strike was effectively crippled. From 1842 to 1935 predicting whether a strike would be legal or illegal, and whether this would make a difference, was a matter of guesswork – one authority calls the law of this time "chaotic."[1]

[1] Bernard D. Metzler, LABOR LAW 28 (1977).

Modern labor law really emerged from the Great Depression and the New Deal. The Wagner Act, or National Labor Relations Act, created a framework for collective bargaining covering most of the private sector. The Fair Labor Standards Act created the first national minimum wage and first effective scheme for enforcing an eight-hour day and 40--hour work week (by requiring premium pay for extra hours). Widespread use of labor arbitration to resolve non-strike disputes (or to substitute for strikes) took hold during World War II. The most common use of arbitration was to judge "just cause" for discharge. President Kennedy extended principles of labor law to federal employees and, beginning in the 1960s, so-called mini-Wagner Acts passed for public employees in a plurality of states.

Teacher Employment

The employment of teachers (and, in higher education, professors) was, of course, influenced by the broader trends just surveyed. Teacher employment also responded, however, to unique features of the educational environment. For example, in a number of high profile cases from 1895 to 1910, well-regarded academics were fired (through at-will termination) because these professors taught ideas or encouraged discussions contrary to the views of university founders and managers. Protests over these firings resulted in gradual development of the concept or doctrine of academic freedom and "tenure."

Typically, "tenure" systems at the university level were meant to protect academic freedom or freedom of speech. The means of protection, however, was to grant the status of tenure to faculty who had gone through some qualifying period and process. Once granted, tenure could only be terminated through a formal hearing-type process in which cause for termination was shown. Once generally accepted in higher education, roughly similar systems gradually extended to the K-12 system. Again, the constitutional due process decisions of the 1970s strengthened these systems. In the 1960s and 1970s teachers and professors also participated in the rapid development of public sector unions. Though these developments were uneven from state to state, by the 1980s the question in the minds of some had become whether tenure, civil service and public unionism, especially in combination, had gone too far.

Legalization

A distinctively American model of employment relations dominated the economy and the law from about 1945 through the 1960s. "Employment-at-will" reigned in small business and the nonunionized private sector. Civil service and tenure dominated public employment. Labor contracts regulated most large industries through bargaining and arbitration. The law offered few rules – which differed by context – and employees either took what they could get from at will employment, sought the greater job security of government service, or joined the unions that bargained the rules of large work places.

This system unraveled for a variety of reasons and in a variety of ways. One ongoing theme of that unraveling is the dramatic expansion of the direct legal regulation of work. Pure at-will employment was eroded – before state courts began questioning it – by the development of anti-discrimination rules. Beginning with the Civil Rights Act of 1964, employment discrimination law has become a pervasive part of the work place. Safety regulation (OSHA), benefits regulation (COBRA and ERISA), and labor market regulation (the Family and Medical Leave Act) have all set legal limits that operate throughout most of the economy. The Supreme Court recognized that public employees do not lose the constitutional rights of citizens when they become employed, establishing a constitutional floor of protection beneath statutory civil service or tenure. These developments "legalized" the work place, while also softening or blurring formerly sharp distinctions between the unionized and nonunionized, the private and the public sectors, and even the tenured and the probationary or at-will.

Personnel Management or Human Relations

Alongside employment practices and employment laws, academics have attempted to study and understand the nature of employment. The first real theory of employee management emerged during the late 19th century. It is termed – somewhat derisively – the "drive" system. The idea was that managers and foremen would coercively "drive" employees to do their job. The second management theory criticized the first and was known as "scientific management" (sometimes called Taylorism, after one of its proponents, Frederick Taylor). Scientific management broke work into easily understood

components. Managers would perform the "mental" tasks and workers would have discrete "physical" tasks not requiring real thought. Efficiency or productivity could then be measured and rewarded. Scientific management – an attempt to humanize the "drive" system – was soon criticized as inhumane.

Beginning in the inter-war era, a major academic school began to criticize Taylorism. The personnel management/human resources (PM) school proposed to pay attention to "the human element." This school is often associated with the famous Hawthorne experiments. These experiments began as an exercise in scientific management of levels of illumination on a factory floor. After a year of adjusting light levels, the experimenters were puzzled. More light led to more productivity. Less light led to more productivity. Going back to the original light level led to more productivity. Ultimately, the experimenters concluded that the personal interaction between the people studying light and workers was the cause of the changes– it had nothing to do with light and everything to do with workers' feeling that someone was paying attention. The PM movement has ever since pointed to these experiments (and other evidence) and maintained a point of view that emphasizes the "cooperative" elements of employment relations and the common interests of employer and employee. In the 1980s and 1990s, for example, many PM theorists pointed to the cooperative nature of Japanese employment and advocated adoption of these techniques.

The Dissenters

Academics who disputed the PM conclusions developed the theory known as "institutional labor economics" (ILE), also beginning in the early 20th century. ILE theorists thought PM practitioners looked at employment through rose-colored glasses. The ILE school emphasized conflict as inherent in employment relationships. Though ILE advocates admitted that some cooperation was part of employment, they believed it was far more likely and common for conflict to fundamentally define the relationship. The ILE school also deployed paradigmatic examples of its theories. Some of the most intriguing cases involved instances in which PM specialists conducted surveys of workers, found them to be well satisfied, and then – sometimes even as the survey results were emerging in print – watched in horror as bitter strikes or even riots erupted at the work place that had just been studied. In the ILE

view, the process of asking survey questions about work satisfaction had inadvertently brought inherent conflict between employee and employer to the surface.

Labor Markets, "Voice" and "Exit"

Unlike neoclassical economists, both ILE and PM practitioners rejected any simple application of "free market" theories to labor, for several reasons:

> The "labor" market is really a multiplicity of markets separated by barriers to movement including geography, education, skill, experience and social connections.
>
> There is no clearinghouse for this "market" or even many of its constituent markets.
>
> Work is not standardized and neither are workers – unlike a pound of refined sugar or an ounce of gold, an hour of work has value based on numerous, dynamic factors.
>
> Employers, employees, and working peers put some value on continuity of relationships – thus, disruption of continuity to respond to minor market changes carries a price (typically, disloyalty).
>
> Many non-wage aspects of work (loyalty, fairness, physical comfort, pace of work, work peers, recreation opportunities) influence both continuity and wages.
>
> Historically employers have superior bargaining power. "Take it or leave it" contracts are common, wages and salaries tend to be conventional (and "sticky") and true negotiation of price rare.

Of course, scarcity, supply and demand have a role in labor markets – they just compete for attention with the expectations created by custom, superior-subordinate power relations, and the perceived intrinsic value of different types of work. One concept relied upon by both the PM and ILE schools is "voice and exit." The idea is that both economic and non-economic aspects of work – the values that compete with price – will be expressed by employees in one of two ways – by making themselves heard (voice) or by leaving the work (exit). How to accommodate "voice" and manage "exit" remain persistent challenges for both employers and theorists.

Charter Employment and the Law

The effect of positive or negative employment relations is critical for site-managed schools engaged in attempted educational "reform." If reform is not reflected in classroom practices, it is meaningless. Those practices are largely the work of teachers. Teachers who are discouraged, angry or insulted by their charter school employers, cynical about reform projects, or burdened with excessive expectations, may still care about their students – but they are not terribly likely to be loyal to the school and its reforms. Even to the extent teachers reluctantly carry out a school's mission, they may find it impossible to convey enthusiasm, much less to act as ambassadors of the school in the larger educational community. And, of course, schools **want** teachers who have some sense of professionalism – pride in their work, dedication to lifelong learning and reflectiveness about education itself.

It would be easy to conclude that, given these challenges, charter schools should engage in safer, more conventional forms of employment. Yet, conventional employment relations are themselves in a state of flux – what counts as conventional is changing. Further, some charter schools were formed by those who perceive "conventional" teacher employment practices as inappropriate or mismanaged – who view civil service systems, tenure and unionism with suspicion or distaste or at least believe these reforms need their own reform. Charter employment is likely to either struggle with rapidly changing conventions or be self-consciously unconventional. In this environment, there are, of course, opportunities as well as risks. Charter schools are in many cases given more freedom to chart their own course in employment relations than are many other employers – both public and private. There remain limits, many drawn by law. A handbook on current employment law cannot predict what lies over the next horizon in American employment practices, nor can it tell a charter school how to steer its course in employment relations – what risks to take or avoid, what opportunities should be seized and which are illusory. It can, however, identify a few of the reefs and shoals.

The Structure of this Manual

The structure of this manual reflects the complexities suggested by the history of employment law – and any reasonably comprehensive discussion of employment law issues will have some overlap

or cross-referencing. While the manual was written so that it, or large sections of it, can be read straight through, many users will probably pick it up while looking for "the answer" to some specific question. We must emphasize here, as throughout the manual, that employment law varies significantly by jurisdiction and over time. Thus, there is no substitute for well-qualified local counsel on specific issues. However, for the issue oriented reader, Part II provides an introductory table of major employment issues, with brief comments and references to the sections of the manual that address these issues in more detail.

Part III begins the main text of the manual by surveying the areas of legal regulation common to almost all employers. First, is a comprehensive review of federal and state anti-discrimination law and brief discussion of certain individual civil rights. Second, are brief summaries of the most widespread forms of labor market regulations (minimum wage, Family and Medical Leave), benefits regulation (e.g., COBRA), safety regulation (e.g., OSHA), as well as Workers Compensation and Unemployment Compensation. Part IV turns to the distinctive issues that arise from the status of most charter schools as public entities and instrumentalities of their state or local government. These include issues of employee certification or licensing, collective bargaining systems, tenure or civil service provisions, and public employee retirement plans. Part V looks at charter school employment policies and contracts specifically, and thus treats issues that are distinctive to the charter school environment or that involve employment policy choices commonly confronted by schools. Not surprisingly, the common law of contracts and of employment plays a prominent role in Part V. Part VI concludes the text with some brief reflections on the significance of employment policy for school reform – or is it the other way around? Part VII is a checklist of items charter schools should consider in drafting their employment policies and contracts, and Part VIII is a brief list of some of the sources available for further guidance or reading.

II. How to Use this Manual – Including a Table of Issues

This Manual is intended to be accessible to reasonably sophisticated lay readers – charter school founders, governing body members, and principals or directors – and useful to attorneys who are advising charter schools but may not specialize in employment law. It is **not** a comprehensive guide to employment law and is no substitute for either well-informed local counsel or, for that matter, reference works designed for counsel in employment matters (some of these are listed in Part VIII). We recommend that individuals dealing with employment issues on a regular basis – school administrators and perhaps members of a personnel committee of a governing board – read the entire manual, perhaps skipping any area they already know well or know does not apply in their jurisdiction or to their school. We cannot overstate the potential significance of employment issues. In a very real sense a school *is* its employees and their attitude toward their employment. The opportunities realized through good employment practices are substantial and the risks presented by bad practices are simply enormous. Thus, charter operators or managers should strive to become aware of and remain current on major employment law issues. Using local counsel or other local resources, operators should try to become versed in the unique aspects of their state and local law – especially in those areas that vary considerably from state to state, such as

- unionization and collective bargaining.
- limitations or exceptions to at-will employment (or, conversely, the application of tenure or similar systems), and
- teacher licensing.

When charter operators understand the employment law environment they are operating in, it is important to develop a comprehensive set of employment policies and then to be sure they are followed (e.g., to train new managers on the policies already in place). Finally, this is a dynamic field. Thus, charter operators should look for opportunities for continuing awareness and education.

While we recommend that the reader read this entire manual, we recognize that legal topics are dry ones. In any event, readers will want to be able to reference particular sections when addressing particular problems. To aide in the search for such assistance, following are cross references to the text

on topics collected here under the headings of: **Compensation; Benefits and Evaluation; Discrimination; Employee Representation and Involvement in Governance; Employee Status, Including "At-will"; Firing and Resignation; Grievances and Dispute Resolution; Hiring; Individual Employee Rights**; and **Job References and Post-employment Issues**. The items in all capital letters identify key terms to be explored in- depth within this document.

COMPENSATION, BENEFITS AND EVALUATION

- Every school has a SALARY STRUCTURE (V.C) for its employees, which may or may not include elements such as MERIT PAY (V.C.2).

- RETIREMENT may be impacted by ERISA (III.B.4) or state law (IV.D), and may involve issues of DISABILITY (III.A.5.e.i & V.H.2.f).

- LEAVE rules must comply with the FAMILY AND MEDICAL LEAVE ACT (III.B.2).

- Schools may give children of staff ENROLLMENT PREFERENCES (V.C.4) as a form of fringe benefit.

- Good EVALUATION (V.E) practices should lead to better employment decisions, and a perception of fairness among staff.

DISCRIMINATION

- Federal law forbids both intentional discrimination, or DISPARATE TREATMENT (III.A.4.a), and some discriminatory effects, or DISPARATE IMPACT (III.A.4.b).

- A strict ENGLISH ONLY (III.A.5.a.ii) policy is likely to result in discrimination based on NATIONAL ORIGIN (III.A.5.a) under a DISPARATE IMPACT (III.A.4.b) theory.

- SEXUAL HARASSMENT (III.A.5.b.v) is a type of discrimination and comes in two forms, *QUID PRO QUO* (III.A.5.b.v.1) and HOSTILE WORK ENVIRONMENT (III.A.5.b.v.2). A HOSTILE ENVIRONMENT (III.A.4.c) created on another forbidden basis, such as race, is also a form of discrimination.

_ Discrimination based on PREGNANCY (III.A.5.b.iv) is a form of sex discrimination. In dealing with pregnant employees an employer should also be sure to remain in compliance with the FAMILY AND MEDICAL LEAVE ACT (III.B.2).

_ Disability discrimination laws protect individuals with DISABILITIES (III.A.5.e.i) who are OTHERWISE QUALIFIED or a QUALIFIED INDIVIDUAL WITH A DISABILITY (III.A.5.e.ii). An individual with a disability is qualified if they can perform the job's ESSENTIAL FUNCTIONS (III.A.5.e.iii), with or without REASONABLE ACCOMMODATION (III.A.5.e.iv). Accommodations are reasonable if they do not cause UNDUE HARDSHIP or a DIRECT THREAT (III.A.5.e.v). To judge these issues the employer must use an INTERACTIVE PROCESS (III.A.5.e.iv), but must *not* make forbidden PRE-EMPLOYMENT INQUIRIES (III.A.5.e.iv.2).

_ Particular areas of controversy in disability discrimination law include ALCOHOLISM AND ADDICTION (III.A.5.e.i.1 & V.H.2.d), CONTAGIOUS DISEASE (III.A.5.e.i.2), and MORBID OBESITY (III.A.5.e.i.4)

_ LIFESTYLE DISCRIMINATION (III.A.5.f.iii) statutes, disabilities of SEXUALITY AND REPRODUCTION (III.A.5.e.i.3), and statutes addressing SEXUAL ORIENTATION AND TRANSGENDER DISCRIMINATION (III.A.5.f.iv) are perhaps the most controversial extension of anti-discrimination concepts.

_ Unlike locally-chartered schools, State-chartered schools may not be subject to all federal anti-discrimination and labor market laws due to emerging doctrines of FEDERALISM (III.A.6). However, anti-discrimination rules also follow federal dollars under SPENDING CLAUSE CIVIL RIGHTS STATUTES (III.A.2.c).

_ In appropriate cases, employees may be disciplined or discharged because they have engaged in DISCRIMINATION (V.H.2.c).

EMPLOYEE REPRESENTATION AND INVOLVEMENT IN GOVERNANCE

_ When employees participate in school governance, CONFLICT OF INTEREST (V.D) rules must be observed.

_ In some states, COLLECTIVE BARGAINING (IV.B) laws and practices will define how employees are represented within a school. Whether your jurisdiction creates a

duty to BARGAIN (IV.B.3) or a RIGHT TO STRIKE (IV.B.4) is a matter of local law.

_ In other jurisdictions, EMPLOYEE INVOLVEMENT (IV.B.7) plans may be created by employers with or without a union.

_ Regardless of the employer's preference, employees generally have a RIGHT TO ORGANIZE (IV.B.1) or join employee organizations, even as a matter of FREEDOM OF ASSOCIATION (VII.A.7.a).

EMPLOYEE STATUS, INCLUDING "AT-WILL"

_ Understanding who is THE EMPLOYER (V.A.1) determines when the school or another entity (e.g., the charter authorizer) has many basic responsibilities.

_ Employment status issues, whether AT-WILL, TENURED OR OTHER (V.A.4 & IV.C) will fix the basic nature of the relationship you have to particular school employees.

_ Whatever employment status you choose, EMPLOYMENT CONTRACTS (V.A.3) should-accurately and consistently reflect features of that status.

_ Employment status and school practices should be reflected in handbooks or rules through EMPLOYMENT POLICY DEVELOPMENT AND UPKEEP (V.F).

_ Some individuals who work at your school may be INDEPENDENT CONTRACTORS (V.A.2) or VOLUNTEERS (III.B.1), with significant implications under the FAIR LABOR STANDARDS ACT (III.B.1).

FIRING & RESIGNATION

_ Whether you can hire or fire a person at your school depends first upon who is the EMPLOYER (V.A.1)

_ An employee's status, whether AT-WILL, TENURED OR OTHER (V.A.4 & IV.C), and any written EMPLOYMENT CONTRACT (V.A.4) or HANDBOOK (V.A.4.a) may define the justifications and procedures required for termination.

_ Even AT-WILL (V.A.4) employees cannot be terminated for reasons that violate the law. Such reasons include employee CIVIL RIGHTS (III), as well the PUBLIC

POLICY, HANDBOOK or COVENANT OF GOOD FAITH AND FAIR DEALING (V.A.4.a) exceptions to the at-will doctrine.

_ As a practical matter, different varieties of EMPLOYEE MISCONDUCT (V.H.2) give rise to certain common issues, regardless of the employee's status.

_ Termination due to physical, mental or emotional DISABILITY (V.H.2.f) is distinct from termination for cause and often intertwined with CIVIL RIGHTS (III.A.5.e) and RETIREMENT (III.B.4 & IV.D) questions.

_ Termination due to the needs of the employer, often called reductions in force or REORGANIZATION (V.H.1), should be distinguished from terminations based on employee characteristics.

_ Employees can terminate their employment through RESIGNATION (V.H.3), or by ABANDONMENT OF EMPLOYMENT (V.H.3.b), though allegations of a coerced resignation will give rise to claims of CONSTRUCTIVE DISCHARGE (V.H.3.a).

_ LAST CHANCE AGREEMENTS (V.H.4) may be utilized in lieu of termination.

GRIEVANCES AND DISPUTE RESOLUTION

_ Employers may wish to head off internal conflict and dissension by implementing a GRIEVANCE (V.G.1) process accessible to employees with concerns.

_ Properly designed GRIEVANCE PROCEDURES (III.A.5.b.iv.4) may provide a defense to certain claims of discrimination or harassment.

_ ALTERNATIVE DISPUTE RESOLUTION (V.G.2) can be used as a means of directing certain employee complaints from the court system into other forums, such as ARBITRATION or MEDIATION (V.G.2.a). Your jurisdiction may place limits on ADR, particularly where it reaches INTEREST (V.G.2.f) and not just "rights" disputes.

HIRING

_ Well thought out JOB DESCRIPTIONS (V.B) are an important first step in hiring.

_ Before hiring your school must know decide how it will deal with teacher CERTIFICATION and LICENSURE (IV.A).

_ Certain INTERVIEW or job-application questions are forbidden or ill-advised because they may violate principles of non-discrimination (III.5.e.iv.2 & V.B).

_ Hiring without sufficiently checking an applicant's background can give rise, if the employee injures another person, to claims of NEGLIGENT HIRING (V.B).

INDIVIDUAL EMPLOYEE RIGHTS

_ Many employees are guaranteed the minimum wage and overtime premiums under the FAIR LABOR STANDARDS ACT (III.B.1).

_ Employees generally have a right to a safe workplace, either under state law or under OSHA (III.B.5). Employees injured on the job have the right to WORKER'S COMPENSATION (III.B.6) and the act of filing a claim may be protected by the PUBLIC POLICY EXCEPTION to AT-WILL employment (V.A.4.a).

_ Employees have CONSTITUTIONAL (III.B.7.a) rights, such as FREEDOM OF SPEECH and ASSOCIATION.

_ Employees may have PRIVACY rights at either the CONSTITUTIONAL (III.B.7.a) or STATUTORY (III.B.7.b) level. Employee activities away from work may give rise to issues under state LIFESTYLE DISCRIMINATION (III.A.5.f.iii) statutes and discipline based on such activities should always take into account what "nexus" or connection there is between the needs of the employer and OFF DUTY MISCONDUCT (V.H.2.e).

_ WHISTLEBLOWERS (III.A.7.b) are often given statutory protection, in some circumstances under the federal False Claims Act.

JOB REFERENCES AND POST-EMPLOYMENT ISSUES

_ JOB REFERENCES (V.I.B) should be handled in a systematic fashion to avoid claims by former employees, particular of DEFAMATION.

_ Employees who lose work without "fault" are entitled to UNEMPLOYMENT COMPENSATION (III.B.7).

_ Terminated employees (and, under some circumstances, current employees) may continue or obtain health care benefits at their own expenses under COBRA (III.B.3).

III. Basic Federal and State Legal Regulation of Employment

Federal and state laws that cover broad swaths of the public and private sectors fall into two rough categories: civil rights (Part A, below), and labor market or workplace regulation (Part B, below).

A. Fundamentals of Employment Civil Rights Law

The following approaches the complex and dynamic field of employee civil rights law in several different ways. Sections 1 and 2 catalogue some of the major federal statutory sources of anti-discrimination law from Reconstruction through the heyday of the Civil Rights movement. Sections 3 and 4 then discuss of some of issues that commonly arise in discrimination matters – regardless of what "type" of discrimination is at issue. Section 5 briefly reviews the major "protected classes" created by anti-discrimination law (e.g., race, sex, religion, age, disability, etc.) and some of the distinctive issues associated with each group. Section 6 discusses recent developments in the law of federalism, or so-called "States' rights." Section 7 concludes the discussion of civil rights issues with a brief review of major "individual employee rights" issues (freedom of speech, free association, privacy and "whistleblowing") that have a significant constitutional or federal component.

The single most dramatic change in both civil rights and employment law in the last fifty years has been the development of laws against "discrimination."- Laws passed during Reconstruction have been dusted off and brought back from obscurity, comprehensive new laws have passed and the idea that discrimination is improper and should not be allowed has spread in our popular and political culture.

"To discriminate" literally means nothing more than "to mark or perceive the distinguishing or peculiar features" of something.[2] To say a person has "discriminating" taste in art, food or films, for example, is to compliment an ability to distinguish the exceptional from the ordinary, the acceptable from the undesirable. Obviously, in this literal sense, employers want to discriminate in selection and retention of employees. The law, however, has long recognized another kind of discrimination – one in which irrelevant characteristics are treated as crucial or minor differences are given undue weight. Such

[2] WEBSTER'S NEW COLLEGIATE DICTIONARY 324 (1981).

discrimination is a "breach of the . . . duty to treat all . . . alike and afford them equal opportunities" or "a failure to treat all equally."[3] This is sometimes referred to as "invidious discrimination."[4]

The basic duty not to discriminate in the second sense can be traced back to deep roots within the common law and American history. However, the end of Reconstruction and the establishment of the "Jim Crow" system froze the development of the law of equality or nondiscrimination for many years. The Civil Rights movement and court decisions beginning with *Brown v. Board of Education*[5] ended this interregnum and brought discrimination issues back to the forefront of American law and politics.

In addition to such historic factors, many employment discrimination claims are litigated because of the vast numbers of employment decisions made every year and, indeed, every day. It requires only a small fraction of employees believing they have been victims of discrimination – or feeling they can get redress by using discrimination laws – to generate a tide of cases. Thus, the law of employment discrimination has expanded and developed rapidly over the last quarter century.

1. Federal, State and Local

We commonly think of anti-discrimination law as national. In fact, within our system of federalism there are typically overlapping anti-discrimination laws. Federal law can be thought of as establishing a "floor" of protection.[6] In fact, many federal civil rights statutes have specific provisions stating that the federal law does not prevent states or local governments from granting more extensive anti-discrimination protection. Similarly, within the states local governments may have authority to pass ordinances or rules forbidding discrimination. Again, local laws may be different from state law. These overlapping levels of authority require employers to be familiar with federal, state and local law and realize that duties can change from one jurisdiction to the next.

a. Responsibilities to Chartering Authorities

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[3] BLACK'S LAW DICTIONARY 553 (1968).
[4] *See, e.g., Williamson v. Lee Optical*, 348 U.S. 483, 489 (1955).
[5] 347 U.S. 483 (1954)
[6] *See, e.g., California Fed. Savings and Loan v. Guerra*, 479 U.S. 272 (1987). This manual will not discuss the anti-discrimination laws applicable to federal employers.

In addition to compliance with law, charter schools need to be cognizant of anti-discrimination policies of the chartering authority. Even if there is no law against a certain type of discrimination, the chartering authority may have adopted a policy on the subject that the school must follow.

2. Reconstruction Era and Modern Statutes

a. The Civil Rights Enforcement Statutes

During Reconstruction, Congress passed a number of laws – known as Civil Rights Acts and the Ku Klux Klan Act – that were intended to make "the equal protection of the laws" a reality. The Supreme Court began giving restrictive interpretations to these laws before the end of Reconstruction. For many decades these laws were little used. These laws were revived by Supreme Court decisions issued from 1961 to 1973 – though some early restrictions have survived**.** The two most significant Reconstruction Era laws are commonly called Section 1981 and Section 1983.

i. Section 1981

Section 1981 first passed to enforce the Thirteenth Amendment. That Amendment emancipated slaves, but Southern states quickly began attempting to re-establish an effective state of slavery. Section 1981 sought to secure emancipation. It gives "[a]ll persons" the

> same right . . . to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens.[7]

Because slavery involved both public, law-making entities (state and local governments) and private parties (slave owners), Section 1981 applies to both governmental and non-governmental actions. However, 1981 *only* applies to "race" discrimination. While "race" includes many ethnic groups,[8] the term is *not* interchangeable with "national origin." Also, 1981 does *not* reach discrimination based on sex, religion, disability or any other non-racial grounds. However, as part of its prohibition on race discrimination, 1981 may reach issues of discrimination against whites (or others) due to their

[7] 42 U.S.C. § 1981(a).

[8] *See, e.g., St. Francis College v. Al-Khazraji*, 481 U.S. 604 (1987) (claim of discrimination against 'Arabs' can be pursued under § 1981).

association with members of another race, and discriminatory retaliation.[9] Section 1981 – like *all* of the Reconstruction Era statutes – only reaches *intentional* discrimination. While most federal anti-discrimination statutes have limitations on remedies – such as a cap on damages – there is no such limit under Section 1981. Thus, intentional racial discrimination triggers the most extensive civil remedies allowed by federal law.

ii. Section 1983

The most important Reconstruction Era statute is 42 U.S.C. § 1983. This law is a major expression of the fundamental change in the balance of federal and state power brought about by the Civil War Amendments. Simply, Section 1983 makes it possible for a private person to sue any state or local government that has violated federal law – whether constitutional or, in some cases, statutory. It is the basic means for private, civil enforcement of federal law against state and local government. When a public employer takes action against a public employee, any claim that this action violated federal law may end up as a 1983 complaint. In employment discrimination cases, Section 1983 gives public employees another way to sue for *intentional* discrimination that violates the *constitution*. Thus, 1983 is the same as 1981 in only applying to intentional discrimination, narrower in only applying to public employers, but broader in applying to discrimination on the basis of race *and* other constitutionally significant grounds – for example, sex, religion and perhaps political affiliations. Section 1983 applies to many issues outside the discrimination context. Section 1983 cannot be used to sue a state itself for monetary damages. - It can be used to force state officials to comply with federal law in the future.

iii. Conclusion

In general, the Civil Rights Enforcement statutes provide strong remedies for a limited class of cases. There are many technical legal issues that can be raised under these statutes that we do not

[9] *See, e.g., Greenwood v. Ross*, 778 F.2d 448 (8th Cir. 1985) (retaliation); *Alizadeh v. Safeway Stores*, 802 F.2d 111, 114 (5th Cir. 1986) (inter-racial associations).

discuss here. There is no administrative system for processing these claims before they are filed in court. In fact, even if a local law or internal "grievance" process would provide some remedy, an employee is generally not required to use this alternative before going to court. The most important lesson of these long-standing laws is that *intentional* discrimination, especially *intentional race* discrimination, gives rise to the most significant available federal remedies.

b. Title VII

The Civil Rights Act of 1964 is the single most comprehensive federal anti-discrimination law. Title VII of that Act[10] is the baseline federal law prohibiting employment discrimination. More employment discrimination claims are filed and processed under Title VII than under any other American law. As originally passed, Title VII forbade employment discrimination by private employers. In 1972 the Act was amended to extend Title VII rules to employees of state and local governments.

Title VII prohibits discrimination on the basis of "race, color, religion, sex, or national origin."[11] It also prohibits retaliation against an employee who has "opposed any practice made . . . unlawful" by Title VII, or who has filed a Title VII charge or "testified, assisted, or participated in any manner" in a Title VII case.[12] Title VII forbids intentional discrimination and certain discriminatory effects.

Title VII charges must be filed with the Equal Employment Opportunity Commission (EEOC) within 180 days of the action being disputed. The time generally begins to run when the employee has notice of this action – even if this comes before its effective date.[13] In some (but not all) states charges are "deferred" to the state agency that investigates civil rights claims. While the EEOC has the right to take the employee's case to court, this is the exception to the ordinary pattern. Normally, after an EEOC investigation there are attempts to negotiate or "conciliate" a settlement. If this is unsuccessful, the EEOC determines if there is "cause" or "no cause" to believe discrimination has occurred. This finding has little significance in itself, except that it triggers a "right-to-sue" letter, allowing the employee to then take his or her case to court. If EEOC proceedings have been pending for more than 180 days,

[10] 42 U.S.C. §§ 2000e-2 - 2000e-17.
[11] 42 U.S.C. § 2000e-2(1) and (2).
[12] 42 U.S.C. § 2000e-3(a).

the employee can actively request a right-to-sue letter. Title VII remedies were redefined by the Civil Rights Act of 1991 and now include compensatory damages, as well as opportunities for a jury trial.

c. Spending Clause Civil Rights Statutes

When the Civil Rights Act of 1964 was being drafted and debated, Congress realized that many entities engaged in discrimination received significant federal funds. In effect, the federal government was funding discriminatory activities or programs. Title VI of the 1964 Act was prompted by this realization and prohibited any "program or activity" that received federal funds from discrimination on the basis of "race, color or national origin."[14] Title VI is *not*, however, a major alternative to Title VII because Title VI only applies to employment when the "primary objective" of the federal funding is to promote employment.[15] Title VI is significant here because its use of a distinctive constitutional power of Congress – the Spending Clause – became a model for other statutes. Under these laws, Congress makes certain forms of nondiscrimination a condition of the agreement to receive federal funds.

Title IX of the Education Amendments of 1972,[16] for example, prohibits discrimination on the basis of sex in any educational program that receives federal funds. Though Title IX is most famous for its effects on women's athletics, it also provides an alternative method for suing educational institutions for sex discrimination in employment. The Age Discrimination in Employment Act (ADEA) similarly has a prohibition on age discrimination in federally funded activities.[17] Perhaps most significantly, Section 504 of the Rehabilitation Act of 1973[18] was the first, and for many years only, federal statute to prohibit disability discrimination. Section 504 follows the Title VI model, prohibiting discrimination only in federally funded programs or activities (but, unlike Title VI, prohibits employment discrimination without regard to the primary purpose of the federal funding).

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[13] *Delaware State College v. Ricks*, 449 U.S. 250 (1980).
[14] 42 U.S.C. § 2000d. Unlike Title VII, Title VI does not reach discrimination on the basis of religion or sex.
[15] 42 U.S.C. § 2000d-3.
[16] 20 U.S.C. § 1681a.
[17] 42 U.S.C. § 6102.

As with the Reconstruction Era statutes and Title VII itself, there are a variety of technical debates concerning the Spending Clause statutes that go beyond the scope of this manual. The main significance of these laws for the charter school employer is that (1) in some cases these statutes provide employees with another route to federal court *and* (2) these provisions give federal funding agencies a role in scrutinizing certain employment practices of the state or local entities they fund.

3. Aspects of Employment Covered: "Adversity"

The most common employment discrimination claims involve termination of employment. Challenges to the failure or refusal to hire employees, particularly challenges to any tests or other screening mechanisms used in the hiring are also common. The scope of these laws, however, reaches any term or condition of the employment relationship. Thus, the refusal of a promotion, or the imposition of a demotion, may be the occasion for a discrimination claim. In the area of alleged "harassment" in the workplace, one question that arises is whether the harassment has been severe enough that it can be said it has changed the conditions or terms of employment.

There is, of course, a limit to what employees can complain about. That limit is described by the concept of "adversity." To give one example, lateral transfers may be adverse if the circumstances show the employer meant or the employee reasonably perceived the transfer as either punishment or a limit on future prospects. However, a 'pure' lateral transfer – with no loss of pay, job prestige or future opportunity – is not necessarily 'adverse' just because the employee preferred other-work.

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[18] 29 U.S.C. § 794.

While loss of pay, benefits or career opportunity is the most common form of adversity, it is by no means the only source of *bona fide* discrimination complaints. In one recent case, an employee who used a wheelchair complained about the transportation arrangements for a training session outside the office. The employer rented vans to transport employees but – despite the employee's request – refused or neglected to rent a lift-equipped van. The employee complained about being manhandled onto and off of the vehicles used for this event. The trial court – and even the defendants – did not question that this action involved sufficient "adversity."[19]

4. Common Discrimination Issues (and Defenses)

Different statutory language or history has resulted in distinct theories of discrimination. The issues most important to newly protected groups – women, for example, as opposed to African-Americans – have brought new issues or aspects of discrimination – such as employer policies toward pregnant employees – to the forefront. The following sections attempt to summarize the main theories or topics that have some general significance, before we briefly review issues unique to different protected classes (e.g., race, sex, religion, age, disability, and so on).

a. "Disparate Treatment"

"Disparate treatment" is both another term for "intentional discrimination" and a description of a Title VII method for providing discriminatory intent. Intentional discrimination on the basis of a forbidden characteristic is the classic form of invidious discrimination and the form with constitutional significance in some cases. There are, roughly, two types of evidence of intentional discrimination and at least two methods of proving such e a case.

First, in some cases the intent to discriminate is openly announced or apparent. A job advertisement that states "only men may apply," tells the reader, on its face, that the employer is "discriminating" against women. With a few exceptions, such open admissions become rare almost as soon as an anti-discrimination statute passes. One variation on this theme, however, is the use of

[19] *EEOC v. MCI*, 993 F. Supp. 726 (D.Az. 1998).

euphemisms, code words or other expressions that are clearly understood as referring to a forbidden basis for employment decisions. An employer who states that the work place needs "new blood," and then proceeds to fire older employees invites the inference that preferring "new blood" was just another way of announcing an intent to discriminate based on age. This sort of evidence is sometimes referred to as "direct evidence" on the theory that it directly reflects the intent or mental process of the employer.

Second, and far more commonly, intent to discriminate is proven through circumstantial evidence. This is not surprising, since a hidden or secretive state of mind can only be proven circumstantially. Common forms of circumstantial evidence include any suspicious timing of events and the odd nature – whether trivial, stale, false or otherwise implausible – of an employer or manager's explanation of those events.

Using direct or circumstantial evidence (or a combination), an employee can simply put on its evidence of improper intent and challenge the defendant to rebut it. However, Title VII also creates a unique method for ferreting out proof of discriminatory intent. Under the Title VII scheme, an employee is given a very light initial burden of proof. For example, merely showing that the employee is in a protected class and that the action unfavorable to the employee was also favorable to someone *not* in the protected class, is enough to meet this initial burden. Then the employer is required to explain its reasons for action. After the employer offers an explanation, the employee gets a second chance to put on evidence to convince the court or jury that discrimination really took place. The requirement that the employer step forward with some explanation creates an opportunity for the employee to explore any weakness in that explanation and argue for an inference of discriminatory intent. This is the method of proof known as "disparate treatment." When an employee uses this method to disprove the truth or reasonableness of an employer's stated reason for some action, the allegedly false or implausible reason may be called a "pretext" or "pretextual."

Given the Title VII allocation of burdens of proof it is obviously important that employers think through their reasons for action and be sure those reasons have some weight – that they are based on knowledge of the true facts, for example, or at least careful investigation, and that they would commonly

be understood as a good reason for taking the action in question. It is not enough to say that an employee is "at will." Though a good reason may not be required by the common law, an employer's inability to articulate a persuasive reason when pressed may well lead to a conclusion that the reason offered was a '-pretext-' and the action was really based on discrimination.

i. BFOQ

One defense to a claim of intentional discrimination is to argue that a normally forbidden consideration can be use due to unique requirements of a particular job. This is called a *bona fide occupational qualification* or BFOQ. Despite the rules against sex discrimination, for example, it would be permissible for a theater company to insist on hiring a male to play Romeo and a female to play Juliet. It was, similarly, a BFOQ for Spike Lee to hire an African-American lead in *Malcolm X*. It is doubtful *any* charter school will *ever* have a job in which race, religion, or age is a BFOQ. As discussed further below, the "qualification" issue becomes more nuanced in the case of disability discrimination. The only area in which a true BFOQ is likely to exist in the charter employment context is the need to hire or assign employees of appropriate gender to supervise sex-segregated locker and rest rooms. It is almost certainly *not* a BFOQ to hire a person of particular national origin to teach a particular subject – one need not be of Hispanic origin to teach "Chicano Studies," for example.

ii. Mixed Motives

People often act for more than one reason. Employment decisions, further, are often made by more than one person. If several people, with many different reasons between them, decide to terminate an employee, how does an issue of discrimination get sorted out? This problem is what the law calls a "mixed motive" issue. Suppose, for example, a teacher informs a charter school governing body that she has become pregnant and will have a baby during the next school year. One member of the governing board is concerned that the teacher will use her leave and not come back because "that's what women do." Others never liked her before she was pregnant. The second group and the one board member concerned about the employee's return to work form a voting majority and terminate the teacher. Has there been forbidden pregnancy discrimination? The most likely answer is "yes."

An employee is only required to show that a forbidden or discriminatory reason was a substantial or motivating reason for the decision. The bad motive of even one board member – even if that board member had several motives – will probably satisfy this test. Then, the employer can defend on the basis that if the illegal motive had never been present the same decision would have been reached in any event – in other words, that the illegal motive, while present, did not 'cause' the result. While this defense can be important, it is often difficult to establish. That is, the employer must show that if history had been different the outcome would have been the same. Juries are understandably skeptical of such arguments.

The solution is not to let history be written this way in the first place. If a board member expresses an illegal motive, even during confidential discussion, board members or administrators should insist that such reasons be taken out of the decision making process. Every decision maker should be comfortable with the legality of not only his or her own reasons, but the reasons being offered and used by others. In the example given above, the board members who never liked the employee should consider whether they really want to "win" based on another board member's dubious and illegal reason.

b. "Disparate Impact"

One of the ways of demonstrating discriminatory intent is to show an overwhelming mathematical or statistical improbability that any other reason can account for certain behavior. This specialized form of circumstantial proof is well illustrated in the classic case of *Yick Wo v. Hopkins*.[20] In that old case, the City of San Francisco required licenses for laundries and then refused to give licenses to every one of over 100 Chinese applicants, while simultaneously granting licenses to all-but-one of 200 non-Chinese applicants. The Supreme Court found the city had used an apparently neutral provision "with an evil eye and an unequal hand." But what if the evidence of statistical disparity is a little less glaring? Or a lot less glaring, but still of statistical significance? How much discriminatory effect is needed to show intent? How much, even if it doesn't *prove* intent, is a cause for concern?

[20] 118 U.S. 356 (1886)

And under what circumstances might an otherwise disturbing discriminatory effect be justified by an employer?

The theory of "disparate impact" attempts to provide one set of answers to such questions. It is important to remember that the "disparate impact" theory has multiple purposes. On the one hand, it is clear that not all cases of discriminatory intent can be proved by either direct or circumstantial evidence. States of mind are invisible and some employers who discriminate will get away with it. A test that reaches some discriminatory effects helps improve deterrence by "catching" some of these hidden cases of intentional discrimination. In addition, a focus on discriminatory effects requires employers and other institutions to ask if their existing practices have real value. If a practice has a discriminatory effect and is for every other purpose worthless, the resulting discrimination may be unintentional, but also lacks justification. Indeed, discriminatory effect analysis is arguably superior to inquiries into intent – instead of trying to "read minds" and hunt down bigots, the disparate impact test asks two straightforward, objective questions: Does the practice have discriminatory effects? If so, does it also have some positive benefit that outweighs this negative effect or cost? The first step in a "disparate impact" case is to establish the discriminatory effect of a certain behavior or practice. A classic example would be a pre-employment test or other screening device. If the test screens out a disproportionate number of the members of a protected class, then it must be justified according to "disparate impact" standards.

i. Business Necessity

The basic justification for a test, screening device, or other practice is whether it is "job related for the position in question and consistent with business necessity."[21] Again, a simple example may help illuminate this abstract test. Suppose physical education teachers are required to pass a test of physical fitness. Suppose further that this particular test has a statistically significant effect of screening out more females than males. To prevail in a discrimination claim brought by women who failed the test, the school will need to show that this test has a real relationship to being a capable P.E. teacher. There are professionals and businesses that specialize in reviewing employment screening tests of different kinds to

[21] 42 U.S.C. § 2000e-2(k)(1)(A).

be able to justify their relationship to the job (or counsel the employer to get a new test).

ii. Less Discriminatory Alternative and Failure to Accommodate

Showing that a practice is "consistent with business necessity" is not an onerous test. However, the employee-plaintiff has one more arrow left in the disparate impact quiver. The employee can try to show that another practice (such as another test) does just as good a job of serving the employer's legitimate interests while also eliminating the discriminatory effect. This is called the "less discriminatory alternative" doctrine. Few cases are actually decided on this basis. When employers are given "less discriminatory alternatives" they usually either take the alternative or reject it on the basis that it really doesn't work as well as the existing practice – and in that case the issue reverts to whether the first practice was "consistent with business necessity" to begin with. The less discriminatory alternative test is identical to the concept of "reasonable accommodation" in disability discrimination law. A "reasonable accommodation" is typically a proposal for how an employer can modify existing rules or requirements and still achieve legitimate interests – literally, a "less discriminatory alternative."

c. Hostile Environment

The "hostile environment" concept is most familiar from sexual harassment cases. Jokes, pranks, ridicule, sexual innuendo, or unwanted touching can all make up part of a harassing "hostile environment." Despite its prominent identification with sex harassment cases, the concept of a hostile work environment has general applicability. If an employer made (or deliberately allowed) a work place to become truly hostile to, for example, the members of a particular religion, this could become a Title VII claim. The theory is simply that a sufficient degree of day-to-day mistreatment becomes an "adverse" term or condition of employment. If such mistreatment is due to membership in a protected class, then it is a form of forbidden discrimination.

d. Retaliation and Coercion

Title VII, the ADA and other civil rights statutes often forbid discrimination for making complaints, testifying, opposing illegal practices or otherwise attempting to support the law. Thus, employees have a protected right to file claims or otherwise oppose what they think are illegal practices.

e. "Affirmative Action" vs. "Reverse Discrimination"

Affirmative action plans attempt to respond to a history of discrimination by creating some system of benefits or preference for the group that historically suffered discrimination. The great debate concerning affirmative action boils down to an issue of specificity. If an individual employee can show that they were discriminated against on the basis of, say, race, it is of course permitted to give that employee a remedy for discrimination (i.e., some "affirmative action"). If, on the other hand, the issue is 400 years of discrimination against African Americans, it is *not* permitted for an employer to only hire African Americans (or a high percentage of African Americans) in a misguided attempt to remedy the nation's past. Somewhere in between these extremes, race-conscious remedies are permitted, but excessively creating sinecures or quotas based on race is not. The Supreme Court has offered deeply mixed signals on when one crosses the line from proper remedies for past evils into improperly creating a new evil. Charter schools may, of course, be bound by existing court orders covering their chartering authority. On the other hand, schools should not adopt affirmative action plans unless there has been careful review, with counsel, of the circumstances that justify the plan, and the contours of the plan.

5. Protected Classes

Keeping in mind the issues that commonly recur in anti-discrimination law we now turn to brief examination of the some of the unique features or issues that arise with regard to each different protected (or, in some cases, unprotected) class. See Box 1.

Box 1, Major Protected Classes in Anti-Discrimination Law

General Federal Law	*State or Local Law*
race/color/nationality/ethnicity	marital status
sex, including	political affiliation†
pregnancy	"lifestyle" or legal activity
sexual harassment	sexual orientation
religion, including	
reasonable accommodation of religious practices	
disability, including	
reasonable accommodation and	
nondisabled associates of disabled individuals	

† Also raises issues under the First Amendment, which may be litigated under 42 U.S.C. § 1983

a. Race, Color, Nationality, and Ethnicity (Title VII and § 1981)

One of the reasons race discrimination is "invidious" is that the entire concept of race is largely a myth. Human beings are not neatly divided into well-defined races. The range of variation within any group defined by ancestry tends to overlap substantially with the variations within any other group. In addition, humans have interbred freely since pre-historic times – if one could go back in time one would discover more common ancestors, sooner, than most people think. But if race is mythical (or nearly so) what does it mean to forbid race discrimination? The drafters of the Reconstruction Era statutes were concerned with freedmen recently released from slavery and, to a lesser extent, with then-unpopular immigrant groups, such as the Chinese. In the debates, however, the drafters reflected the understanding of the time, discussing the "German," "Irish," "Russian," and other "races." Title VII approached this problem by referring to "race, color . . . or national origin."

Thus, the Supreme Court has held that Section 1981 and Title VII clearly forbid discrimination based on concepts of "race" that have been rejected by biologists, anthropologists and others but are, in fact, at the root of invidious discrimination based on ancestry. Thus, discrimination against "Jews,"

"Arabs" or any other perceived "racial" category is covered by these statutes.[22] A handful of more specific issues have emerged in trying to define "race, color or national origin."

i. National Origin and Alienage

National origin is *not* the same as alienage. National origin refers to the reality or perception of a person's ancestry. Alienage refers to one's current country of citizenship and any related immigration status. Thus, the categories of "national origin" and "alien" are not interchangeable.[23] Only if a "no aliens" rule were adopted for "the purpose or effect" of excluding people due to national origin, would this raise a Section 1981 or Title VII issue. Despite this, discrimination against *legal* aliens may well be actionable under Section 1983 (in part because state and local governments have no business interfering with the federal practice of granting certain immigrants or visitors legal status).[24]

ii. National Origin and "English Only"

"National origin" has been long understood to include speaking a language other than English. "English only" rules may violate Title VII and can also raise serious First Amendment issues.[25] In general, any requirement for speaking English should be justified by business necessity, including specific definition of when use of non-English languages is considered problematic. Such rules must be reasonable: a teacher who is able to speak to a parent, for example, in the parent's native language should not be forbidden from using the most effective available form of communication. Simply, blanket "English only" policies are ill-advised, but employers can require appropriate communication and this can mean using English (or, for that matter, using another language) in defined contexts.

b. Sex or Gender (Title VII, Title IX and the Equal Pay Act)

i. Equal Pay Act

The Equal Pay Act, 29 U.S.C. § 206(d), passed before Title VII, and forbids paying men and women at different rates for "equal work." Equal work is not necessarily identical. The Act has been

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[22] *St Francis College v. Al-Khazraji*, 481 U.S. 604 (1987).
[23] *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86 (1973).
[24] *See Takahaski v. Fish and Game Comm'n*, 334 U.S. 534 (1948) (legal alien may not be denied state commercial fishing license).
[25] *See, e.g., Ruiz v. Hull*, 957 P.2d 984 (Ariz. 1998).

characterized as requiring the same pay for work that is "substantially equal."[26] Whether jobs are substantially equal is analyzed by looking at skill, effort, responsibility and working conditions. If all four of these factors are equivalent then the two jobs are "equal" and rates of pay may not vary according to gender. A plaintiff who prevails under the Equal Pay Act receives double damages: i.e., the amount of financial loss times two.

ii. Comparable Worth Theories

Plaintiffs – primarily women – have also pursued claims under Title VII that lower pay for certain jobs that are not, strictly speaking, "equal," may still amount to forbidden sex discrimination in compensation. These arguments go by the name "comparable worth." A "comparable worth" claim based on a theory of intentional discrimination may have merit under Title VII. "Comparable worth theories based on discriminatory effects have been rejected by the courts. If jobs are very similar, but not identical, an employer should be careful not to in any way determine compensation by criteria that are linked to gender.

iii. Title VII and Title IX

As mentioned above, employees of educational institutions that receive federal funds may pursue *either* their administrative and court remedies under Title VII or may proceed directly to Court under Title IX. Also, the federal Department of Education may use Title IX directly to scrutinize the employment practices of a school or local educational agency.

iv. Pregnancy Discrimination

An amendment to Title VII makes it clear that discrimination on the basis of pregnancy is considered discrimination on the basis of sex. The point of reference for pregnancy discrimination is how the employer treats other employees with other temporarily disabling conditions. The Pregnancy Discrimination Act amendments require that employers extend the "same" treatment to pregnant employees. Courts have noted that this means an employer who treats all employees with temporary

[26] *Shultz v. Wheaton Glass Co.*, 421 F.2d 259 (3rd Cir.), *cert. denied*, 398 U.S. 905 (1970).

disabilities badly may extend the same (bad) treatment to pregnant employees. This is correct, but has been superceded, to some extent, by the Family and Medical Leave Act (FMLA) (see section II(B)(2) for more information). For employers covered by FMLA, some measure of accommodation will extend to the needs of pregnant employees. Some states have specific measures that require accommodations for pregnant employees. These provisions are *not* pre-empted by Title VII, but in some cases may have been superceded by FMLA.

v. Sexual Harassment

(1) *Quid Pro Quo*

The original theory of sexual harassment has the Latin title "*quid pro quo*," which means: "this for that." *Quid pro quo* harassment exists when an employer or supervisor conditions a job benefit on the employee's participation in sexual activity.

(2) Hostile Work Environment

Hostile work environment harassment exists when unwelcome sexual conduct or contact (which may include jokes, insults, distribution of pictures, pranks, or assaults) is sufficiently pervasive and offensive that a judge or jury can conclude it changes the employee's conditions of work. It is important to remember that minor acts of misjudgment – such as a single off-color joke – may *not* amount to harassment. On the other hand, tolerating such incidents with *no* counseling or consequence invites the development of a work place culture than can be indicted as constituting a hostile work environment.

(3) The Target of Harassment

Sexual harassment can target women or men. Further, the Supreme Court has held that same-sex harassment is actionable under Title VII. With either *quid pro quo* or hostile environment harassment, the only question is whether the individual has been targeted due to gender or sex – the gender of the accused harasser will be no defense.

(4) Grievance Procedures and Prevention

An employer can easily be unaware of the actions of an individual supervisor or group of employees that results in a claim of sexual harassment. Further, traditional grievance policies, in an

attempt to preserve a "chain of command," often direct employees to present their complaint to the very person who is harassing them. Employers can defend a sexual harassment claim on the basis that the employer took reasonable steps to prevent harassment. However, to make out this defense an employer must have an "escape valve" in their grievance policies that always gives the harassed employee an option other than complaining to the person who is abusing them. In addition to this, an employer should affirmatively raise the subject of harassment, express strong disapproval, and be prepared to use appropriate and significant sanctions.

c. Religion

Title VII prohibits discrimination based upon the religious beliefs or practices of employees.

i. Accommodating Religious Practices under Title VII

Title VII defines discrimination based on religious practice to include failure to "reasonably accommodate" the practice. Common issues that arise under this requirement include time off for religious observances or events, religiously prescribed dress or appearance, and religious practices that may otherwise violate employer rules. Reasonable accommodation does not include any action that would cause an employer "undue hardship," and in this context "undue hardship" includes any cost or inconvenience that is more than *de minimis* (that is, very small). On the other hand, an employer should be sure to understand an employee's request for accommodation and consider whether it can be met – the failure to properly investigate and analyze a request for accommodation has been held by many courts to constitute a violation.

ii. Establishment Clause Problems

Schools present a unique issue of accommodation because the school is also under an obligation not to "establish" religion. Though a full discussion of establishment clause issues is beyond the scope of this manual, it is safe to say that "accommodation" under Title VII should *not* include allowing individual instructors to import religious instruction into their classroom or teaching practices.

d. Age Discrimination in Employment Act

Age discrimination was *not* included in Title VII. In 1967, Congress passed the Age

Discrimination in Employment Act (ADEA). The ADEA forbids discrimination in employment against persons 40 years of age or older due to their age. The methods of proof under the ADEA are similar to Title VII with several important variations. First, under the "disparate impact" method of proof it is not necessarily pertinent for a person discriminated against on the basis of age to show that a person under age 40, or perhaps even a "younger" person, enjoyed the opportunity lost by the complaining employee. In the words of the Supreme Court, "that one person in the protected class has lost out to another person in the protected class if thus irrelevant, so long as he has lost out *because of his age*."[27] While a comparison to a much younger person may still be used as evidence, other kinds of evidence that age was a factor in an employment decision may be used to prove intentional age discrimination. Conversely, while "disparate impact" theories of age discrimination may be valid for some purposes, use of rules that have statistical correlation with age but truly have another *bona fide* basis (such as length of work or seniority) are *not* considered to result in discrimination "because" of age.

Another issue that arose after the ADEA passed concerned benefits based on age (such as retirement plans). The issue has a convoluted history, but the ultimate outcome was that age-based benefits are not forbidden *if* there is an actuarial basis for the prohibition. The other major area of concern to public employers are rules that provide for mandatory age-based retirement. The ADEA rules on this issue vary according to both type of employee, age of the employee and the mandatory retirement rules in effect in different states as of certain dates in 1983 and 1986 – when the relevant amendments were adopted. A school that faces an issue of mandatory retirement should consult local counsel and determine the precise ADEA category for the employee in question.

The original ADEA remedies were drawn form the Fair Labor Standards Act. As a result, it is possible, in ADEA cases, for an employee to obtain double damages for "willful" violations.

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[27] *O'Connor v. Consolidated Coin Caterer's*, 517 U.S. 308, ___, 116 S.Ct. 1306, 1310 (1996) (emphasis in original).

e. Disability Discrimination: Section 504 and the ADA

Disability discrimination was first forbidden in federal law through Section 504 of the Rehabilitation Act of 1973, a Spending Clause civil rights act. That is, Section 504 forbade disability discrimination in "programs or activities" that received federal funds. The concept of disability discrimination developed under Section 504 and related provisions from 1973 to 1990. In 1990, Congress passed the Americans with Disabilities Act (ADA).[28] In many ways the ADA takes rules developed under 504 and applies them generally. In employment, the ADA has the scope of Title VII.

i What is a "Disability"?

The ADA and Section 504 define disability without resort to a specific list or description of disabilities. The general definition of disability is "a physical or mental impairment that substantially limits one or more major life activities." "Major life activities" include things such as walking, standing, hearing, seeing, working, and learning. Thus, a prospective employee who is paraplegic and arrives at a job interview in a wheelchair is unmistakably "substantially limited" in the "major life activity" of "working" and thus disabled. At the same time, a recovered alcoholic who decides not to mention her troubled history *may* be (the issue can be closer in this case) a person with a disability entitled to protection – including the right to maintain some privacy about her disability.

Though this definition has been in use for a quarter century, many basic issues about its scope and meaning remain open and current law requires a careful case-by-case approach. A few issues are settled. Whether a physical or mental impairment "substantially limits" a major life activity is analyzed *after* taking into account any remedial or mitigating measures the person uses. Thus, for example, a person may have very poor eyesight which is corrected by glasses. If the correction works well enough, this person is *not* disabled in the major life activity of seeing. This doctrine should be approached with some caution. Few corrective measures work as simply and completely as eyeglasses do for routine problems of visual acuity. Nonetheless, disability is to be analyzed *after* looking at corrective measure even for such situations as high blood pressure controlled by medication, and

[28] 42 U.S.C. §§ 12101-213.

monocular vision corrected by behavioral adaptations.

It is also clear that the formal list of major life activities is not limited to the items listed in the statutes or regulations. Thus, for example, the Supreme Court found that HIV infection (even in its earliest stages) was a "disability," because it immediately had a significant and restrictive impact on the "major life activity" of "reproduction."[29] Reproduction is not listed in the statute or regulations, but was a "major life activity" in the view of the Court. In addition, the Court found the relatively small chance of passing on a "dread" and fatal disease was enough to be a "substantial limitation" on this life activity.

In addition, Section 504 and the ADA are not only concerned with the reality of disability, they are also concerned with mistaken assumptions of disability. Thus, if an employer clearly communicates that he or she considers the employee disabled this will be evidence of disability and *may* result in a finding that the employee was "regarded as" disabled. Finally, by way of general cautions, it is important to remember that being disabled in the major life activity of "working" is only *one* way of showing disability under Section 504 and the ADA. For some reason, employee plaintiffs often claim to be restricted in working. This is probably the most difficult way of providing disability and unquestionably the form of disability that makes it most difficult to win a discrimination case. Because many employees and their attorneys have gone down this difficult path, it is easy to find cases involving people we would ordinarily think of as clearly disabled where a court finds the employee is *not* disabled under the ADA. In fact, the Supreme Court has clearly hinted that employees and their lawyers are making it hard on themselves by focusing too much on the major life activity of working. Sooner or later, employee attorneys are going to find other, more persuasive, ways of describing their clients' disabilities. Thus, while employers should be aware that just showing an employee is or is not "disabled" can be an important ADA issue – and one on which many employers have had surprising success – it is nonetheless safest to approach an employee who appears to you to be "disabled" with the assumption that the ADA applies. It is also important to keep in mind that state statutes may forbid discrimination on the basis of specific named conditions or forbid discrimination based on specific

[29] *Bragdon v. Abbott*, 524 U.S. 624 (1998).

aspects of life with a disability, such as using a guide or service dog.[30]

Though Section 504 and the ADA use general definitions of "disability," some persistent issues have either developed a general rule in the case law or resulted in more specific legislative treatment and even amendments to these definitions. We review a few of these topics below.

(1) Alcoholism and Addiction

Whether alcoholism and addiction should be considered disabilities was controversial from the day Section 504 passed. In effect, two different compromises have developed to adapt the concept of disability discrimination to alcoholism and addiction. With respect to addiction to illegal drugs, the condition or status is regarded as a disability, but the act of taking illegal drugs – and the effects that has on behavior – is not considered protected. In effect, "recovered" addicts who are not using or persons undergoing current treatment are considered "disabled." Addicts who are using are considered to be engaged in misbehavior and not protected. Alcoholism is slightly different. Because consumption of alcohol is not illegal, an active alcoholic may still be considered disabled, but a sharp distinction is created between the condition (whether active or "recovered") and any resulting impact on work. Any behavior of the alcoholic that adversely impacts work and may result from consumption of alcohol is unprotected and may be treated in the same way that the same behavior would be treated for a nonalcoholic employee. In addition, employers are specifically permitted to adopt and enforce strict

[30] *See, e.g.*, Cal. Gov't Code § 12940, *et seq.*("medical condition"); Conn. Gen. Stat. § 46a-60(1)-(3), (5), (7) (mental retardation, learning disability, blindness); La. Rev. Stat. Ann. §§ 23:342 and 23:352 (medical conditions related to childbirth and sickle cell anemia); Nev. Rev. Stat. §§ 613.330 (aural or visual handicap); N.J. Rev. Stat. § 10:5-12a (specified blood traits); N.Y. (Exec.) Law art. 15 § 296(14) (use of guide, hearing or service dog); N.C. Gen. Stat. § 95-28.1 (sickle cell carriers); S.D. Codified Laws Ann. §§ 20-13-10 - 20-13-12 (blindness); W.Va. Code §§ 5-11-3(h), 5-11-9 (visual handicap);

rules against possession, use, sale or being under the influence of drugs or alcohol at work.

(2) Contagious Disease

Contagious disease will be considered a disability if the employee can otherwise meet the general test for "disability." In the case of *Arline v. School Board of Nassau*,[31] for example, the Supreme Court found a teacher with tuberculosis to be disabled under Section 504. An employer is permitted, of course, to take steps to control or prevent the spread of contagious disease to other employees, patrons or the public. But reflexively firing an employee due to their contagion without first realistically assessing the risk and considering less drastic alternatives ("reasonable accommodation") raises an immediate and serious disability discrimination issue.

(3) Disabilities Related to Sexuality and Reproduction

While "reproduction" is a "major life activity" – making HIV infection, for example, a disability – the ADA specifically excludes certain conditions related to sexuality from its coverage. Homosexuality and bisexuality are defined as "not impairments" and, therefore, not a disability.[32] The ADA defines the following conditions, which are generally recognized as mental or behavioral impairments, to *not* be protected disabilities: transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, other sexual behavior disorders, and gender identity disorders not resulting from physical impairments.[33]

(4) Morbid Obesity

Court decisions are split on whether "morbid obesity" is a *bona fide* medical condition that should be considered – in some circumstances – a disability. The safest course is to assume that diagnosed morbid obesity – not merely being overweight – may qualify as a disability.

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[31] 480 U.S. 273 (1987).

[32] 42 U.S.C. § 12211(a)

[33] 42 U.S.C. § 12211(b)(1)

(5) Mental Disabilities

Section 504 and the ADA make no categorical distinction between physical and mental disabilities. Thus, individuals with sufficiently pronounced cognitive impairments ("mental retardation"), people with major psychoses ("mental illness") and perhaps others will be able to claim that their mental impairments substantially limit major life activities, making them disabled. It may be important, in thinking about employees with mental disabilities, to reflect more carefully on the "essential functions of the job" issue discussed below. Courts have recognized that things like being able to get along with others, and being able to understand and follow instructions, are "essential functions" of many jobs. Thus, the obligation not to discriminate against persons with mental disabilities will often be measured with reference to the extent to which the individual's condition does or does not prevent them from doing the job and the extent to which the employer has properly explored the issue of reasonable accommodation. Certain diagnosable behavioral conditions are defined by statute *not* to be disabilities. These include kleptomania, pyromania, compulsive gambling and psychoactive substance abuse disorders resulting from current illegal use of drugs.[34]

ii. Otherwise Qualified or QIWD

A common misunderstanding of Section 504 and the ADA is that it protects all persons with "disabilities" (whatever that means). In fact, Section 504 only protects an "otherwise qualified" disabled person. The ADA changes this term (but not the concept) to a "qualified individual with a disability" (QIWD). In both cases, the concept is that the person not only has a disability but is also "qualified" to participate in some activity (such as employment). Thus, what is forbidden is not discrimination – in the literal sense – based on disability, but discrimination *despite* qualification, due to disability.

To put the same point another way, Section 504 and the ADA permit an employer to take adverse action against employees due to their disabilities. What they forbid is taking adverse action due to disability *when* this is unjustified or needless – when the employee is "qualified." It is crucial, then, to somehow measure what makes a person with a disability "qualified" for a job. Because of this unique

[34] 42 U.S.C. § 12211(b)(2) and (3).

feature of disability discrimination, it is still common – and may remain common – to find employers who freely admit that they took adverse action due to an employee's disability. Whether such behavior is legal or illegal cannot be analyzed across-the-board, but must be reviewed on case-by-case basis.

iii. Defining Essential Functions

The specific definition of being "qualified" (or "otherwise qualified") for Section 504 or ADA employment discrimination purposes can be stated as "being able to perform the essential functions of the job, with or without reasonable accommodation." We will return to reasonable accommodation below. Here we discuss the concept of "essential functions." An "essential function" is one that, if removed, would truly change the job in question. Employers are encouraged by the ADA to place work functions into written job descriptions, which get special status as evidence of what is or is not an "essential function." Clearly, however, the concept is intended to distinguish between those minor or ancillary functions that could be easily reassigned and those functions which "are" the job in question.

iv. Interactive Process and Reasonable Accommodation

A person is "qualified" or "otherwise qualified" under the ADA if they are able to perform the "essential functions" of the job *with or without reasonable accommodation.* "Reasonable accommodation" is not precisely defined, but the statute gives a list of examples of what may be reasonable accommodations in certain cases. These include reassignment to a vacant position, job restructuring, part-time or modified work schedules, and acquisition or modification of assistive devices. The issues are, simply, can the employer make some sort of change in the work environment that will enable the person with a disability to perform all the "essential functions" of the job? And, if so, are the changes that would allow this "accommodation" of a sort and cost that can be called "reasonable?"

Generally, an employer should *not* reach a conclusion that no accommodation is possible without first discussing the situation with the person with a disability. This "interactive process" is critical because, in many cases, employers may overestimate what will be required or may be unaware of the real nature of the disability. The person with a disability is often well informed on advances in technology, for example, that are relevant to their needs. On the other hand, the employer may be

aware of workplace opportunities and limitations that the disabled employee does not know about. A simple conversation about what the employer needs or can do and what the employee is able to do – or would be able to do, if something were changed – will satisfy this "interactive process" requirement.

(1) Architectural Access and Auxiliary Aids

Though the issue of reasonable accommodation is usually a general one that can only be pinned down through case-by-case discussions, both public employers and private businesses are separately subject to requirements for architectural access to their facilities. The rules regarding architectural access are detailed, complex, and vary significantly depending upon the type of facility, whether it was built before or after the ADA passed, and what activities are being carried out in the facility (among other things). If the problem faced by a disabled employee is impacted by architectural access issues, the employer should take extra care to make sure the separate rules on architectural access have been properly followed.

(2) Testing and Pre-Employment Inquiries

Though an employee's disability *must* be discussed in order to provide a reasonable accommodation (or in order to decide that a requested accommodation is not reasonable) it must *not* be discussed in pre-employment interviews and the like – unless raised by the prospective employee. While many employees with disabilities want and need accommodations, many do not. Many of those who need no accommodation also prefer to keep private medical information to themselves. The ADA generally prohibits pre-employment inquiries into disability (though not into job-related abilities) and pre-employment medical testing. Drug tests are defined *not* to be medical tests. If medical screening or testing is necessary, it should be required after an employee has been given a conditional offer of employment. If the employee fails a legitimate medical test or exam after accepting this conditional offer, the offer can be withdrawn. The ADA rules on employee interviews are complex and to a degree controversial, but the basic rule is that questions about medical history or disability should be avoided, unless a prospective employee raises the issue him or herself and wishes to discuss accommodations. You may ask, always, about ability to do the job "with or without reasonable accommodation."

In some cases, the test itself may discriminate on the basis of disability. For example, a blind teacher may be perfectly able to teach, but will not be able to pass a pre-employment or licensing examine if it is given in print. The key here is to make sure any form of examination tests for the skills needed for the job and not for a disability that may or may not impact the job. While most relevant to testing agencies, this requirement will apply to any formal screening device used by an employer.

v. Undue Hardship and Direct Threat

A proposed accommodation is not reasonable if it will cause an "undue hardship" or a "direct threat." An undue hardship is any "significant difficulty or expense," taking into account the nature and cost of the accommodation and the resources and responsibilities of the employer. In other words, what may be a "reasonable accommodation" for General Motors, may be an "undue hardship" for a Mom-and-Pop business that just happens to reach the size required for ADA coverage. Like the test of reasonable accommodation, the test for "undue hardship" is judged case-by-case. A "direct threat" is a real risk to the health or safety of others arising from the disability of the employee. Direct threat issues most commonly arise with employees with contagious diseases or certain mental illnesses. An employer should consider the severity and nature of the threat, the probability it will be realized, and whether it can be prevented by some accommodation, before determining that there is a "direct threat."

vi. Associational Discrimination

The ADA forbids employers from discriminating against nondisabled people due to their social or other relationship to a person with a disability. The most common examples of this are persons with disabled children and the partners of individuals with HIV infection.

f. Others – State and Local

As noted above, many states have discrimination rules that vary somewhat from the federal models. A few of the common variations are discussed below.

i. Marital Status and Nepotism Rules

A number of states forbid discrimination on the basis of "marital status." These statutes forbid

discrimination based on whether a person is "married" or "single." Generally, these statutes would *not* forbid employment of an individual by their spouse or other rules aimed at the abuses of nepotism.

ii. Political Affiliation

State or local law may forbid making employment decisions on the basis of political affiliations. The First Amendment also places some limits on patronage systems of public employment.[35]

iii. "Lifestyle" Discrimination Laws

Several states have adopted rules that prohibit discrimination on the basis of an employee's lawful activities away from work. These statutes were generally proposed and passed at the behest of the tobacco industry in order to limit the effect of "no smoking" rules and in some cases are limited to "use of lawful products" or even to use of tobacco. Their language, however, is often broader and may prohibit employers from considering most legal activities that take place away from work. Many of these statutes have exceptions and a school that is concerned about an employee's legal but questionable activities away from work should consult with local counsel before deciding to take any adverse action.

iv. Sexual Orientation and Transgender Discrimination

Perhaps the most controversial extension of anti-discrimination concepts has been to forbid discrimination based on sexual identity. Distinguishing the issues, and understanding the limited law in this area, requires careful definition of terms.

Sexual orientation refers to the relation between the sex or gender of a person and the sex or gender of those the person finds sexually attractive. That is, *sexual orientation* refers to one's status as heterosexual (males attracted to females and *visa versa*) or homosexual, often referred to as gay (males attracted to males), lesbian (females attracted to females), or bisexual (persons attracted to males and

[35] A First Amendment claim would most likely be pursued through 42 U.S.C. § 1983. Some federally funded programs also contain specific prohibitions on discrimination based on "political affiliation or belief" in those specific programs. *See, e.g.,* 42 U.S.C. §§ 1577 (Job Training Partnership Act) & 9849 (Head Start).

females). During the early part of the 20th century, homosexual orientation was commonly considered a mental illness and homosexual behavior was often a crime. The American Psychiatric Association removed homosexuality from its listing of recognized psychiatric disorders in 1973. Homosexual behavior has also been widely, but not universally, decriminalized. Federal laws to forbid employment discrimination based on sexual orientation have been proposed, but not passed. At this writing about a dozen jurisdictions forbid employment discrimination based on sexual orientation. In other jurisdictions, some localities forbid such discrimination and others do not. Chartering authorities may also have policies.

Transvestism refers to the propensity to wear clothing conventionally associated with the opposite sex. The reasons for and context of the use of opposite sex apparel vary (which may affect whether the behavior is protected). Transvestism is not exclusively associated with any sexual orientation. Thus, statutes, ordinances or policies that forbid discrimination based on sexual orientation have generally been interpreted *not* to reach discrimination against transvestites. Transvestism is a recognized psychiatric condition. However, the ADA expressly defines "disability" *not* to include transvestism. State or local statutes or ordinances, or chartering authority policies, related to "disability" or "handicap" (but not the ADA or Section 504) are either defined, or may be construed, to reach transvestism in a few cases. Also, "lifestyle" discrimination statutes may protect individuals whose transvestism takes place solely away from the work place. However, in general – in most jurisdictions and under most existing anti-discrimination laws – transvestites do not receive anti-discrimination protection.

Transsexualism (also called "gender disphoria" or "gender identity disorder") refers to ~~an~~a person's belief that their "true" sexual identity is the opposite of their biological sex. This is a recognized psychiatric disorder. In addition, so called "intersexuals" have biological features of both sexes and may, of course, experience a resulting psychiatric "gender identity disorder." Transsexuals have attempted to claim that discrimination against their condition is forbidden as a form of sex discrimination. Courts have

uniformly rejected these efforts.[36] Courts have also held that laws against discrimination based on sexual orientation do not reach transsexuals, since the issue is not same-sex attraction, but personal sexual identity.[37] Finally, the efforts of transsexuals to use disability discrimination laws have been largely unsuccessful.[38] The ADA expressly excludes gender identity disorders that do not result from physical impairments from its coverage. Impliedly, therefore, only intersexuals might be covered by the ADA – and this could in turn depend upon what treatment the individual had received and whether they could demonstrate "substantial impairment" in a "major life activity." Only two reported lower court decisions have found state or local protection for transsexuals. A New York case found New York City's comprehensive anti-discrimination ordinance forbade such discrimination[39] and a District of Columbia court found that the District's prohibition on "appearance" discrimination could reach transsexuals in a properly plead case.[40] In general, however, most jurisdictions and most cases have permitted employment discrimination against transsexuals.

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[36] *See, e.g., Ulane v Eastern Airlines,* 742 F2d 1081 (7th Cir. 1984), *cert denied* 471 US 1017.

[37] *See, e.g., Underwood v Archer Mgt. Servs.*, 857 F. Supp. 96 (D.D.C. 1994).

[38] *See, e.g., Doe v. Boeing Co.*, 121 Wash. 2d 8, 846 P.2d 531, 533 (Wash. 1993) *and Holt v. Northwest Pennsylvania Training Partnership*, 694 A.2d 1134 (Pa. Cmw. 1997). *Contra: Doe v. United States Postal Serv.*, 37 Fair Empl. Prac. Cas. (BNA) 1867, 1869 (D.D.C. 1985)(note that this holding, rendered under Section 504 of the Rehabilitation Act, has been reversed by the conforming amendments to the ADA).

[39] *Maffei v. Kolaeton Industry,* 164 Misc. 2d 547, 626 N.Y.S.2d 391 (Sup.Ct. 1995).

[40] *Underwood v Archer Mgt. Servs., supra* n. 11.

v. Still Other

Individual states forbid employment discrimination on a variety of other bases. Different state anti-discrimination statutes treat, for example, arrest, convictions or expunged juvenile records; family responsibility; height or weight; matriculation; parenthood; personal appearance; public assistance status; sickle cell trait; unfavorable military discharge; being a victim of domestic abuse; or submission to polygraph, genetic, HIV or certain drug or alcohol tests.[41] The citations we give in the footnote are only a general guide and only accurate as of this date. Again, there is no substitute for local counsel on such issues.

6. Federalism Issues – the 11th Amendment and State vs. Local Charters

Within the last five years the Supreme Court has begun actively limiting the applicability of certain federal laws to the States themselves under the 11th Amendment to the Constitution. Most recently, the court found that the ADEA did not apply to the States and next term it will consider the

[41] *See, e.g.,* ALASKA STAT. §§ 23.10.037 and 44.19.456 (certain lie detector tests and parenthood); CAL. GOV'T CODE, § § 12940 *et seq* (arrest record); D.C. CODE ANN. §1-2502 (family responsibilities, matriculation, personal appearance); DEL. CODE. ANN. tit. 19, § 704 (polygraph); HAWAII REV. STAT. § 378-2 (arrest or court record); 775 I.L.C.S. § § 5/1-102 (unfavorable military discharge); IOWA CODE §§ 730.4 and 730.5 (submission to polygraph or submission to drug tests without probable cause); LA. REV. STAT. ANN. § 23:352 (sickle-cell trait); ME. REV. STAT. ANN. tit. 5 §§ 19301l, *et seq.* (submission to genetic test or genetic test results) and tit. 32 § 7166 (submission to polygraph test); MASS GEN. L. ch. 151B § 4(9) (failure to furnish information about misdemeanor convictions or arrests that did not result in conviction) and ch. 149 § 19B, ch. 111, § 70f (submission to lie detector or HIV testing); MICH. COMP. LAWS § 37.2202 (height or weight); MINN. STAT. §§ 181.75, 181.954 and 363.01-.03 (receipt of public assistance, submission to lie detector tests, submission to drug testing absent reasonable suspicion or a written drug testing policy); N.H. REV. STAT. ANN. §§ 141-H:3 and 141-H:6 (genetic testing); N.Y. (EXEC.) LAW art. 15 § 296(16) (arrest or criminal accusation not resulting in conviction), § 292, 296 (genetic testing); N.Y. (LABOR) LAW art. 20-B §§ 733, 735 (lie detector testing); N.C. GEN. STAT. §§ 95-28.1, 95-28.1A and 95-241 (sickle cell trait or genetic testing); N.D.CENT.CODE §§ 14-02.4–03 - 06 (receipt of public assistance); OHIO REV. CODE § 2151.358 (expunged juvenile record); OR.REV. STAT. §§ 659.029-30, 659.225-27, 659.700, 659.705 and 659.715 (expunged juvenile record, use of breathalyzer test without "reason to believe" employee is under the influence, use of lie detector test and certain genetic testing); 18 PA. CONS. STAT. ANN. § 7321 (lie detector tests); R.I.GEN. LAWS §§ 12-28-111 and 28-6.1-1 (domestic abuse victims and lie detector tests); UTAH CODE ANN. § 34-38-110 (false alcohol or drug test); VT. STAT. ANN. tit. 21 §§ 494a and 511 and tot/ 18, ch. 217 (certain polygraph and drug tests and genetic testing); WASH. REV. CODE § 49.44.120 (certain lie detector tests); W.VA. CODE § 21-5-5b (certain lie detector tests); WIS. STAT. §§ 111.31, 111.321, 103.15 and 111.372 (arrest or conviction records, lie detector tests or genetic tests). The federal Employee Polygraph Protection Act broadly prohibits use of lie detectors for employment purposes, 29 U.S.C. § 2002, but does

same issue with respect to the ADA. It is important to realize that these cases do *not* limit the applicability of federal law to *local* government. The 11th Amendment only protects a State itself from liability. Also, in most cases a State or its officials can still be sued to force future compliance with federal law – only retroactive relief (such as money damages) is barred. Finally, discrimination based on race, sex, religion and perhaps disability may still be the basis for a damage suit against a state. Nonetheless, in some states charter schools are entirely a creature of state government. In those jurisdictions, charters may have additional protection against certain forms of federal liability.

7. Individual Employee Rights

a. **Constitutional Rights**

Under 42 U.S.C. 1983, an individual employee can contend any adverse action by a public employer is a violation of their individual rights. Perhaps the most common issue to arise in this fashion is retaliation for the exercise of the right of free speech or free expression, as guaranteed by the First Amendment. Of course, a public employer has the right to regulate many aspects of work-related speech. The classic retaliation case involves a public employee who writes a critical letter to the editor of a local newspaper, or takes a public position on a controversial public issue. Just because this individual is a public employee does not mean they have lost First Amendment rights or can be fired as a form of punishment. The analysis of free speech issues can be complex, but several factors will help guide it. To the extent the speech concerns issues of "public concern" it is more likely protected. To the extent it is merely of personal concern to the employee, it is less likely to be protected. To the extent the speech occurs in a traditional forum for free speech (like a letter to the editor of a newspaper), the more likely it will be protected. To the extent it takes place in the work place – and especially if it disrupts the work place – the less likely it is protected.

In addition to free speech, employees have a constitutional right to freedom of association. Most significantly for charter schools, an employee has the constitutional right to join together with other

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not apply to state or local governments or "political subdivisions." 29 U.S.C. § 2006.

public employees in organizations concerned with education and work place conditions. In other words, union membership, as such, is a constitutionally protected status.

The other common constitutional concern relates to employee privacy interests. Employees have a reasonable expectation of privacy in their personal effects. Thus, when a public employer looks in an employers' briefcase, desk or rifles through other personal property, this may be a "search" that is regulated by the Fourth Amendment search and seizure clause. Employers should not dig into the personal property of employees without consulting counsel and being sure the activities either is not a "search" or is a justified search.

b. Statutory Privacy Rights and "Whistleblower" Statutes

There are two major statutory areas in which employers should be concerned with individual employee rights. First, most states have laws regulating what is or is not a public record and what must be treated as a private employment record. Employees are granted rights to confidential treatment of some or all of their employment records by these statutes. As the rules vary from state to state, charter employers should make efforts to become specifically informed on the requirements for maintaining confidential employment records.

Second, both federal and state laws create specific protections for "whistle blowers." The oldest of these laws is the False Claims Act, which dates back to the Civil War (and to the common law before that). The False Claims Act creates a unique system in which private individuals can try to prove that another private person has committed fraud against the federal government. A person who successfully proves such a claim receives a portion of the funds recovered (a kind of bounty). More importantly, any employee who takes action to disclose fraud against the federal government is protected from retaliation.

The False Claims Act only reaches a very small range of behavior – revelation of fraud against the federal government. Many individual states create protections for employees who reveal defined forms of misbehavior by their employer. These whistleblower laws vary from state the state, but the underlying principle is simple: If an employee is reporting conduct that should never have happened, the

employee may well be exercising a right, and even a duty, under state law.

B. Basic Workplace Regulation

Many issues involving labor markets and work place practices were historically a matter of state regulation or no regulation. However, quite apart from its role in defining and protecting civil rights, Congress also has power to regulate the labor market and workplace practices through the Commerce Clause of Article 1 of the Constitution. Over time, federal regulation has grown at the expense but not to the exclusion of state regulation. We have selected seven areas of interest to charter schools that fall into this category of broad economic regulation by either the federal or state governments. The most long-standing concern in the field of labor market regulation is establishing and enforcing a minimum wage and a reasonably standard work week. The federal government has taken the lead in this area with the Fair Labor Standards Act. Another broad labor market regulation – and the most recently development in this area – is the Family and Medical Leave Act, which establishes a floor of protection for taking leave from work for certain purposes. A third federal law, falling in slightly different category, is COBRA. COBRA grows out of the historical oddity that during World War II employers used paid health insurance as a way of improving compensation in spite of wage and price controls. This became a common feature of the American labor market while, at the same time, the social welfare "safety net" for health insurance remained quite incomplete. Thus, the issue of what happens to heath insurance secured through work when, of example, employment ends, is regulated by COBRA. The Employee Retirement Income Security Act (ERISA) responds to the analogous set of issues with respect to pensions earned through employment. The next two topics – OSHA and Workers Compensation – treat federal and state efforts, respectively, to deal with safety, accidents, injuries or illness arising out of the working environment. Finally, Unemployment Compensation is a portion of the Social Security Act designed to soften the immediately financial impact of loss of work and provide a brief period of transitional income, at least for those who lose work through no "fault" of their own.

1. FLSA and Overtime

The Fair Labor Standards Act requires establishes the minimum wage, eight hour day and forty

hour work week as the basic standard for all employment in the United States. FLSA applies to employees of local governments but not to employees of the State itself. FLSA does not regulate the work hours of "professionals," and thus will not apply to a typical salaried teacher. But FSLA will apply to hourly workers of most, if not all, charter schools. An employer who requires or allows an hourly employee to work more than 40 hours in one work week will be required to pay the employee at an overtime premium rate.

Charter schools frequently wonder how one distinguishes "employees" from "volunteers" under the FLSA. There are surprisingly few cases on this issue, but two rules should be kept in mind. First, a person who is an employee cannot also be a volunteer. If you allow hourly employees to "volunteer" extra time, you owe them extra pay. Second, if it appears a person was forced to "volunteer" in order to obtain some item of economic value, this may transform the person from a "volunteer" into an employee. How this will apply to charter school parents (who presumably have a right to free public education without regard to charter enrollment) remains to be seen.

2. Family and Medical Leave Act ("FMLA").

The federal Department of Labor provides a good summary of the requirements of the Family and Medical Leave Act:

> The Family and Medical Leave Act of 1993 (FMLA or Act) gives "eligible" employees of a covered employer the right to take unpaid leave, or paid leave if it has been earned, for a period of up to 12 workweeks in any 12 months because of the birth of a child or the placement of a child for adoption or foster care, because the employee is needed to care for a family member (child, spouse, or parent) with a serious health condition, or because the employee's own serious health condition makes the employee unable to do his or her job. Under certain circumstances, this leave may be taken on an intermittent basis rather than all at once, or the employee may work a part-time schedule.
>
> An employee on FMLA leave is also entitled to have health benefits maintained while on leave. If an employee was paying all or part of the premium payments prior to leave, the employee would continue to pay [their] share during the leave period. The employer can recover its share only if the employee does not return to work for a reason other than the serious health condition of the employee or the employee's immediate family member, or another reason beyond the employee's control.

> An employee generally has a right to return to the same position or an equivalent position with equivalent pay, benefits and working conditions at the conclusion of the leave.
>
> The employer has a right to 30 days advance notice from the employee where practicable. In addition, the employer may require an employee to submit certification from a health care provider to substantiate that the leave is due to the serious health condition of the employee or the employee's immediate family member. Failure to comply with these requirements may result in the denial of FMLA leave. Pursuant to a uniformly applied policy, the employer may also require that an employee present a certification of fitness to return to work when the absence was caused by the employee's serious health condition. The employer may deny restoration to employment without such certificate relating to the health condition which caused the employee's absence.

29 C.F.R. 825.100.

As subdivisions of state or local government, charter schools are public agencies covered under FMLA. While the constitutionality of the FMLA's coverage of some state entities is being litigated, the safest assumption is that FMLA applies to all charter schools. While the constitutionality of the FMLA's coverage of some state entities is being litigated, the safest assumption is that FMLA applies to all charter schools. Charter school operators should note the "*Special Rules Applying to Employees of Schools*" found at Section 825.600. This section adds three things to the general FMLA scheme. First, it creates a potential exception to FMLA coverage for isolated, rural schools where the school employs fewer than 50 employees and is at least 75 miles away from any other school under the same employer (usually the school board). Second, it addresses situations where instructional employees take intermittent leave (where the employee would be on leave for more than 20 percent of the total number of working days over the period the leave would extend), and options the employer has to lessen the impact on their instructional duties. Third, it provides guidelines for instructional employees taking leave at or near the end of an academic term.

Employees must have worked for the employer for at least twelve months, working at least 1,250 hours during twelve months to be eligible for FMLA leave. Notice explaining FMLA's applicability and workings must be conspicuously posted on the employer's premises. If an employer

maintains an employee handbook, information concerning FMLA entitlements and employee obligations under FMLA must be included in the handbook or other document. It is important for employers to define when leave they offer under their own policies is or is not "counting" against FMLA leave. Failure to do so may mean the employer owes the employee policy-based leave *and* FMLA leave.

3. COBRA

The Consolidated Omnibus Budget Reconciliation Act of 1985 ("COBRA") requires employers of more than 20 employees – including public employees at the state or local level – that provide group insurance coverage as an employee benefit to extend that coverage under certain circumstances for former employees and dependents. Circumstances that trigger COBRA coverage are known as "qualifying events" and include the following: termination of employment, reduction in hours worked to the point of ineligibility for benefits, death or divorce of the employee, and a few other specific events.

Covered employees must elect to extend coverage within a specified time period (60 days from the "qualifying event, or notice of such event"), and such extended coverage is at the employee's expense. Coverage may be extended up to 18 months following termination or a reduction in hours, and for longer periods under certain other circumstances. Employers are required to: 1) provide notice of COBRA applicability to all current and new employees; and 2) notify those employees of their COBRA rights and responsibilities anytime a "qualifying event" takes place triggering COBRA coverage. Employee handbooks are good places to provide this information. As certain "qualifying events" may not be known to the employer (e.g. divorce), employees need to understand their obligation to notify the employer of the event and make their coverage election within 60 days.

4. Employee Retirement Income Security Act (ERISA)

ERISA regulates employer pension plans and employee retirement benefits. Public employers at the state or local level are generally exempt from its operations. Thus, to the extent charter operators are clearly classified as public employers under state law, ERISA will not apply. However, ERISA-type regulation may still apply to charter school retirement plans under either: (1) state law or constitutional provisions governing public employee retirement; or (2) Internal Revenue Service regulations which

must be complied with prior to a public employer having their retirement plan approved by the IRS.

5. Occupational Safety and Health

Congress passed the Occupational Safety and Health Act ("OSHA") in 1970 promoting workplace safety through a comprehensive system of regulation, inspection, and enforcement of work sites across the country. Whether OSHA itself applies to public employers varies depending upon whether a State has adopted federal standards and enforces OSHA itself. Employers who have OSHA or work place health or safety concerns should consult specialized counsel in their jurisdiction.

6. Worker's Compensation

Worker's compensation laws provide a statutory mechanism to compensate employees injured on the job. These laws are essentially a compromise providing the employee guaranteed compensation in the event of an injury, while at the same time prohibiting that employee from seeking possibly greater compensation from their employer through the court system. Where applicable, worker's compensation is the only recourse an injured employee has available – the "exclusive" remedy.

Worker's compensation laws are in place in every state, though not mandatory in three states (New Jersey, Texas, and South Carolina). Public employers are generally covered to the same extent as private employers, so charter schools should assume their states' worker's compensation laws apply to them. In each state, some sort of worker's compensation agency administers the program and is the best place to start for employers seeking more information as to how they fit into their state's system.

7. Unemployment Compensation

Unemployment compensation was part of the original Social Security Act. Unemployment compensation is a system of insurance. Employers pay a "tax" – though the rate varies with, among other things, the employer's history of past claims, making this tax look more like a premium based on risk assessment. Employees who lose work without "fault" on their part are then entitled to a period of compensation for this unemployment. The period is defined in weeks – and the number of weeks goes up when the rate of unemployment goes up. Beneficiaries are required to keep looking for work to maintain their entitlement. State rules on what amounts to "fault" that will disqualify an employee from

benefits vary significantly. In general, however, an employee who quits without reason or is fired for cause is "at fault." An employee who is laid off due to the needs of the employer is not "at fault." Treatment of illness or disability varies.

An employee who is laid off must file a claim. The employer can then agree to the claim or contest it. If the claim is contested, the employer will be required to appear at a hearing and demonstrate that the employee was "at fault" within the meaning of state law. Each state maintains a hearing procedure for those who wish to contest claims. Documents filed and statements made in unemployment proceedings can end up being used as evidence in cases involving other issues (such as discrimination claims). However, administrative decisions made in the unemployment hearing process decisions are generally not binding in cases. If either party appeals an administrative decision to court, the court decision *may* have some binding effect on other cases arising out of the same loss of employment.

IV. Common Issues of State Public Employment Law and Chartering Authority Policies

Employment by government imports an issue of public accountability and trust into the employment relationship. In some sense, in a democracy, government employees may report to a manager but are responsible to the public at large. Employees are also citizens, with rights and responsibilities that may go beyond or create conflict within their role as a subordinate in the employment relationship. Finally, educators are also professionals. Some evidence of expertise and adherence to norms of professional behavior are, therefore, expected. The policy issues that bear on these more specific aspects of public employment and employment as educators tend to be ones in which state law or local policy predominates (excluding, of course, employment by the federal government, which we do not review here). Box 2 lists the issues that we will consider in this portion of the manual.

BOX 2 – State Regulation of Public Employment

Certification and Licensing
Unionization and Collective Bargaining
Tenure
Public Employee Retirement Plans

A. Certification and Licensing.

Individual states define and regulate the criteria and qualifications necessary to work in their public schools. From teachers to administrators to bus drivers, employees must obtain the certificate or license required of their profession as a prerequisite to working in the state's public schools. Certification programs are usually administered by the state's department of education.

As public schools, charter schools are subject to the same statutory requirements of certification and licensure except where specifically exempted under state law or where granted specific waivers of that law. Exemption or waivers may vary from one class of employees to another – while administrator

certification may be automatically exempted in a state's charter act, requirements for school nurses may be identical to those from other public schools. Charter schools need to understand how state certification and licensure requirements work. To the extent those requirements apply to your school, you as an employer are responsible for ensuring initial and continuing compliance with those requirements. That means hiring new staff only upon a showing of appropriate credentials, but also ensuring that staff maintain their required certification or licensure over time.

Federal special education law adds a twist to the certification question. The Individuals with Disabilities Education Act ("IDEA") mandates that students with disabilities must receive instruction from professionals "appropriately and adequately prepared and trained." 20 U.S.C. § 1412(15). Under the implementing regulations, this is interpreted as having certification "based on the highest requirements in the State applicable to the profession or discipline in which a person is providing special education or related services." 34 C.F.R. 300.136(a)(1). Thus, federal law effectively requires special education or related services to be provided by personnel licensed at the highest applicable level for their specific discipline. State waivers or exemptions will not alter this federal requirement. Many states require training in child abuse identification for public school personnel. Charter schools should check with their authorizers, state departments of education, law enforcement agencies, and social services departments about applicable rules and training opportunities.

B. Unionization and Collective Bargaining

Few charter schools engage in the collective bargaining process. Many charter schools, however, are subject or potentially subject to such bargaining. The history and structure of collective bargaining in America is very complex and the following brief sketch should be understood as necessarily an oversimplification.

As reviewed in somewhat more detail in the introduction, the model most commonly used in discussing collective bargaining in American arose from tactics of the American Federation of Labor (AFL) developed from the 1870s to the 1920s, the revival of unionism by the Congress of Industrial Organizations (CIO) during the Great Depression, and the Wagner Act or National Labor Relations Act (NLRA) of 1935. This model was refined with wide-spread use of labor arbitration during World

War II and 1950s amendments designed to both lessen union power and address perceived abuses.

The resulting laws give the employees they cover a protected right to *organize* and use some forms of *self help* (e.g., strikes); employ a model of defining *bargaining units* (i.e., groups of employees who are allowed to negotiate as one); recognize *exclusive representation* (meaning a union with majority support represents 100% of the employees of a bargaining unit); and require *good faith bargaining*. There are many detailed nuances and incidents to such a system. While this system flourished after World War II, it entered a period of serious and sustained decline with the oil embargo of 1973, the period of "stagflation" that followed, and the breaking of the air traffic controllers' or PATCO strike in 1981 (though this was, in fact, a strike by federal employees that took place outside the NLRA structure). Today, union density in the private sector is at its lowest level since the 1920s.

Public sector unionism has followed a somewhat different trajectory. Public employees created unions during the first period of the AFL's expansion – from about 1880 to 1920 – and no strong distinction was made between public and private unionism. The notion that public sector unions – and particularly strikes – were different and problematic arose during the post-World War I strike wave and "Red Scare." With a few exceptions, public sector unionism virtually disappeared in the 1920s and did *not* reappear during the New Deal. Dramatic expansion of public sectors unions at the state and local level only took hold in the late 1960s. Despite the development of a modern public sector union movement, *the federal law of collective bargaining*, does *not* apply to most employees of state or local governments. *Public school employees are not covered by any uniform federal law regarding collective bargaining.*

Certainly, public employees may make use of certain federal constitutional rights (e.g., freedom of speech and freedom of association) in connection with collective bargaining, but for the most part the collective bargaining process for teachers and other public school employees varies from state to state. In the 1970s a number of states used the model of federal labor law to create labor laws for their own state or local employees. A few of these states grant such employees rights that may go beyond the NLRA model. Other states closely follow the federal system with only a few variations. In a number of states, some of the federal concepts have been utilized but others (such as the right to strike) rejected.

In several states, school employees are a special case, treated differently from other state or local employees. A number of states have never enacted modern labor laws. Some of these states recognize collective bargaining but do not follow all aspects of the federal model. Still other states have refused to legitimize public collective bargaining, which exists, if at all, in the shadow of unfavorable laws. Despite this extreme degree of variation from state to state, a few of the basic concepts of the NLRA are widespread enough to warrant a few comments.

1. The Right to Organize

Even at a constitutional level, public employees have the right to gather together in groups and discuss issues of common concern. Belonging to an employee organization (whether it is called a union or not) is a protected, constitutional right.

2. The Right to Protest

It is, of course, a short step from employees talking with each other to employees deciding to address concerns to a governing board or body. Again, this right has constitutional roots and should be respected. Every citizen – including citizen-employees – can "petition for redress of grievances" or otherwise exercise free speech. As with "free speech" issues generally, when employee protest is a proper expression of opinion and when it becomes unprotected "conduct" (or misconduct) is a complex question. Alongside the constitutional issues, the applicable statutory analysis will vary from state to state.

3. The Right to Bargain

There is no federal constitutional right of public employees to bargain with their public employer. If a right to bargain exists, this is by virtue of state or local law. Remember, however, that determined employees can bring sustained pressure to bear on an organization regardless of the formal legal structure.

4. The Right to Strike

The right to strike is the single most controversial aspect of public sector labor relations. Whether – and when – there is a right of public employees to strike is very much a matter of state and

local law. In many cases, there is no black-and-white answer to this issue – rather, the legality or illegality of a strike will depend upon details of local law and the facts that give rise to the particular dispute. Of course, the employer whose employees strike illegally may find itself in a severe dilemma. Especially in a small school environment, a strike would be an unmistakable signal that something is terribly wrong at the work place. Getting rid of the symptom may not cure the disease.

Short of a strike, employees may engage in other "job actions." Two common tactics are "sick outs" and "working to the rule." "Sick outs" involve large numbers of employees falsely reporting in sick. Generally – even in states that recognize the right to strike – sick outs are unprotected. Of course, in responding to a sick out, an employer should recognize that a few employees are likely to be honestly sick, by coincidence, with the job action.

"Working to the rule" means doing exactly what the job requires – but nothing more. There is nothing "illegal" about working to the rule – any employee could choose to do this at any time. However, an at-will professional employee would obviously put him or herself at risk of poor evaluation and termination if he or she took no initiative and accepted no added responsibility. How a charter employer should respond to a "work to the rule" campaign should be determined after consulting with local counsel.

5. Seeking Local Counsel

Given the extreme variation, involving many details, among state laws, it is very difficult to offer specific advise on how to deal with employees who may seek the right to bargain collectively or who engage in various forms of protest. In some locales the rules will be clear and detailed and may either compel bargaining or effectively prevent it, permit a protest or permit punishing the protesters. In other areas, the rules themselves will be disputable. There is no substitute for seeking well-informed local counsel on such issues. Fortunately, again, it will be a rare case when a charter school is an actor in the collective bargaining process itself. More likely difficulties will concern compliance with existing bargains and the issue of employee involvement in management.

6. Compliance

Many charter schools are part of a larger entity (such as a school district) that bargains collectively. Whether and how the collective bargain regulates the charter school will be determined by a combination of state law and the bargaining process itself. *If your chartering agency has made your school subject to one or more collective bargains, make sure you become fully aware of what this means*. Collective bargains are contracts, but they are also complex, multi-party contracts. That is, they share features with commercial contracts, but in other respects are more analogous to a constitution or organic organizing document. Understanding which basic rules apply to you, and how they apply, is critical to controlling the risks faced by both the school and the chartering agency that is a party to the contract.

7. Employee Involvement: The *Electromation* Problem

The second important issue that is likely to be confronted by some charter schools is also the single most counter-intuitive aspect of the American collective bargaining system. In addition to the rules that discourage employers from discriminating, interfering with or punishing union activity, the NLRA also forbids employers from promoting or sponsoring unions or union-like organizations. So-called "company unions" were a common feature of the American economy in the 1920s and were outlawed by the Wagner Act. In other words, the NLRA model is based on the notion that worker organizations should be autonomous from the employer. The fear is that employer-sponsored "unions" will also be employer-dominated.

This issue gained new prominence in the 1980s as union density in the private sector began a precipitous decline. In effect, the absence of unions created a vacuum for expression of employee "voice." Employers began turning to models such as "quality of work life" circles, employee involvement (EI) plans, or other "high involvement" schemes. The *Electromation*[42] case reaffirmed that the NLRA forbids any collective mechanism by which employees are invited and actively encouraged by the employer to participate in determining terms and conditions of employment.

[42] 309 NLRB 163 (1992)

Of course, again, with state and local public employees, the NLRA model may or may not apply in a particular state or local jurisdiction. Thus, your charter school may or may not be subject to a rule like the *Electromation* case. Certainly, if one draws on the literature of comparative labor relations, there are other mechanisms for employee "voice" than the American AFL-CIO-style union. In Japan the American 1920s model of company unions has been adopted and followed (and some would argue that employer dominance of employee organizations is a fact of Japanese industrial life). In many European countries, the law creates "work councils," elected by employees, that must exist in every covered work place and that are given specific powers (e.g., over health and safety issues). Even in the United States, a few unionized work places (most famously, Saturn Corporation) have replaced the traditional collective bargaining system – by union and employer agreement – with a "high involvement" work place. If your charter school is not covered by an NLRA-style statute (or is covered by a collective bargain with a union willing to be innovative), there is no reason that other models of employee "voice" cannot be used. Again, however, be sure of the local ground rules.

C. Tenure

What would you do if a student accused a teacher of sexual abuse? Suppose the student's story is detailed and, on its face, persuasive. Suppose the teacher hotly denies the accusation and also seems persuasive. Suppose there are no witnesses to the alleged abuse itself. How would you decide the issue? Would you give the teacher a "presumption of innocence" or "benefit of the doubt?" Would you consider any ulterior motives the student might have? Would you interview people who might corroborate or contradict details of each story? Would you give the teacher the opportunity to comment on or respond to any inculpatory evidence? Or would the accusation be enough to cause you to fire the teacher, perhaps without even revealing why that action was taken? Would it matter if the teacher was a rookie or a respected veteran?

"Tenure" simply means that an indefinite term of employment can only be ended by the employer for certain reasons, with evidence to support those reasons. The reasons to end tenure can be thought of as falling into the following three broad categories: The first set of reasons are those based

on the employer's needs or convenience (often called layoffs, reductions-in-force or downsizing), and may include issues of whether one employee can 'bump' another employee during the course of some reorganization of the work place. The second set of reasons are those based on an employee's acquired medical disability and inability to continue doing their job. The third set of reasons are those based on "cause" – i.e., employee incompetence or misconduct (such as our example of alleged sexual abuse). Because the reasons for termination of tenured employment are limited, there are often disputes about whether the purported justification is true or sufficient. To resolve such disputes some "due process" system – usually involving an opportunity for a trial-type hearing – is required. In a tenure system, the accusation of abuse we imagined above would call for thorough investigation and might result in a contentious "hearing."

On the one hand, tenure can be a very limited protection. Employee advocates have joked that the difference between tenure and at-will employment is that the tenured employee is told why they were fired. However, the hearing procedures created to judge whether cause for discharge exists are often complex and expensive. Thus, the costs associated with termination of tenure may operate as a powerful deterrent to firing an employee – even if a real cause for discharge exists. Perhaps the most difficult cases are those suggested by our example – where an employee is accused of some serious form of misconduct and flatly denies the allegations. If the evidence of misconduct is mixed – if it is hard to tell what really happened – an employer may find they are unable to fire a tenured employee even though a cloud of doubt and suspicion continues to hang over the employee's head. Of course, this is precisely the reason employees want the protection of tenure – being fired due to allegations or suspicions that one knows are false is a professional employee's nightmare. Within the common framework of requiring cause for termination and using due process to judge whether cause exists, the precise substantive terms and procedural details of tenure or civil service systems vary considerably.

Tenure systems generally have a probationary or qualifying period before a person "becomes" tenured – the rookie/veteran distinction is at its core. In university-level systems, obtaining tenure normally requires a positive act. There must be a recommendation that is formally acted upon before

tenure is granted. In many K-12 systems, in contrast, tenure is conferred by a certain term of seniority. If the employee is re-employed after a defined period of probation, tenure follows automatically. If charter employment decisions will impact tenure, it is important for charter school managers to know when the probationary period will be completed and when an employee is considered tenured.

While tenure provides job security, it does not guarantee a *particular* job. Thus, for some charter schools the issue may be whether a tenured employee can be moved out of the school (though not out of a job). Standards for transfer or reassignment are often a secondary element of a tenure system – and one that varies tremendously from place to place.

A common confusion is for charter employers to give employees contracts stating that the employee is at-will or nontenured, but to *also* say that the employee will be treated fairly or will only be fired for a "good reason." These employers have sent contradictory messages. Words like "good reason," or "just reason," or "sufficient reason," are exactly what creates tenure. If a charter employer is allowed by law to use employment at-will, and then chooses to do so, it should not send a mixed message. A court may later determine that the employees given this message were given a binding promise of fair treatment – that is, tenure. A school in this situation would not only be required to prove cause, it would also need to assure that the procedures used met constitutional due process requirements. While these standards are not necessarily onerous, they would almost certainly be violated by an employer who acted as if an employee was at-will.

D. Public Employee Retirement Plans

Many states have public employment plans that operate outside the Social Security system. Where the state requires that charter schools participate in such plans, school management must make sure it understands everything from enrollment of individual employees to calculating the appropriate liability for the school's budget. It may be important for the school to become familiar with details – such as vesting rules – that at first blush appear only to be of interest to employees. How the plan operates – both its limits and the protections it affords employees – often impact recruitment and hiring, especially if employees are being recruited from another state or from employers that utilize other retirement plans.

Many retirement plans have 'disability' options. If an employee appears to be medically disabled from further work, it is important to coordinate employment decisions with disability plan decisions so that the apparently disabled employee does not end up losing both a job and pension benefits. Finally, remember that the term "disability" has different meanings and continues to evolve. As the ADA and Section 504 encourage employment of more "disabled" employees, the standards for when a person is truly work-disabled – not just a person with a medical condition, but a person eligible for a pension because they "cannot" work – are likely to become more stringent.

V. Charter School Employment Policy Issues and the Common Law

With the frameworks established by federal and state law – whether treating civil rights, labor markets, or aspects of public employment – each charter school has some authority to make real choices about employment policy. These choices most commonly express themselves in the contract relationship created with employees. These contracts exist in the context of the common law of contracts and each jurisdiction's common law of employment. The issues collected here are indicated in Box 3.

Box 3. School Policy and Common Law Issues

Fundamentals of the Employment Relationship
- Defining the Employer
- Employees vs. Independent Contractors
- Verbal and Written Contracts
- Employment Status (At-will and Between At-will and Tenured)

Hiring Process
Compensation (including Merit Pay and Enrollment Preferences)
Conflicts of Interest
Employee Evaluation
Employment Policy Development and Upkeep
Grievance Systems and Alternative Dispute Resolution
Ending the Employment Relationship
- Reorganizations
- Employee Misconduct
- Resignation Issues

A. Fundamentals of the Employment Relationship

1. Employer

Charter schools are sometimes in the unusual position of being allowed to decide whether they will or will not be an employer. Instead of being the employer, in some cases a school may simply manage the employees of the school district or other chartering agency. In some cases, the powers typically given to employers seem to be split – with some vested in the charter school and some in the chartering entity. Obviously, the more power a chartering agency retains, the less control the charter

school has over its own employees. If there is then a conflict between the authorizer and the school, employees may find themselves caught in between the two – or employees may feel the conflict has enabled them to engage in misconduct without consequence.

Frequently, charter schools will find themselves dealing with both their own employees and some employees of other educational agencies (e.g., for special education or related services). Again, the issue arises of whether and to what extent the school is really given the needed power to supervise or manage persons who are not, strictly speaking, "its" employees. If a special education employee of the chartering school district, for example, is assigned to the charter school but refuses to do the work (or even to show up for work), the charter school's only recourse may be to plead with the district to do something with the employee. In a time of conflict with the district, this plea may go unanswered. In general, as to any employee who is delivering significant services to the school's students, most schools will prefer to have most or all of the rights of true employers. A school that decides to rely, instead, on the employees of others should do so with its eyes wide open to the indirect and uncertain control that may result.

2. Employees v. Independent Contractors

Like many employers, charter schools frequently choose to use independent contractors for certain jobs or services at the school. When a school makes this choice, it must take care that those treated as independent contractors are truly independent contractors and *not* employees. If an employer seeks to classify certain individuals as independent contractors instead of employees, it should take care to set up and manage that relationship in such a way as to ensure that the status is not subject to question or challenge at a later date. Factors impacting the characterization include the following:

How much **control** does the employer exercise over the worker? Who sets the hours and schedule for the worker? How much control does the worker have over the manner in which they go about their work – i.e. does the employer dictate how the job is done, or simply expect the job to be finished? Does the worker use his or her own tools or equipment? Is the contractor located on the employer's premises or work out of his or her own space?

Is the worker **exclusively** employed by the employer or are free to contract with others to

provide the same or a similar service?

Is their status spelled out in **contract**? Is there an agreement between the parties explaining the rights and responsibilities on both sides of the independent contractor agreement? Do the contract terms pay the worker a fixed sum, with the obligation to pay expenses, payroll taxes, and any relevant benefits resting with the worker? Do they use company letterhead? A company car?

In analyzing whether or not a worker qualifies as an independent contractor, employers should review each of the above factors. In general, the more control the employer exercises over the worker and their product, and the more there are tangible ties to that specific employer, the more likely it is the relationship will be properly classified as one of employment rather than an independent contract. *Every independent contract should then be put in writing.* The written contract should recite why the relationship is an independent contract *and* should clearly identify the worker's responsibility to pay estimated tax, self-employment tax, and so on.

Given the questions that can be raised about status, why hire an independent contractor instead of employees? While the vast majority of jobs at any given charter school are most appropriately filled by full-time or part-time salaried employees, certain other functions may be better staffed by contractors. They can be paid by the job without involving employment contracts, benefits, or any assurances of employment beyond the specific job they are hired for. For example, a school that doesn't need a full time janitor may choose to hire a janitorial service to clean the school after hours rather than struggle trying to fill a part-time position, supervise that position, provide the proper cleaning equipment and supplies, and so on. Even though the janitorial service may choose to assign one specific individual to the school, the janitor is still working as an independent contractor (or as an *employee of* the independent contractor, not the school).

3. Contracts, Verbal and Written

If properly authorized individuals make oral promises these can become part of the employment relationship. For any regular, ongoing employment relationship – full time or part time – the best practice is to put contracts into writing. The written contract can then make it clear that only the promises contained in that writing are part of the relationship (a so-called "zipper clause"). The written

contract can be reasonably brief and can incorporate employment policies – subject to any revisions later made in those policies – by reference. Indeed, even without express reference, employee handbooks, employment policies or any other writing can also become or become part of the written contract. With substitutes and other strictly temporary employees, it is sometimes not worth the time and effort to reduce a contract to writing. In that case, there should at least be a written policy statement that is used as a point of reference. Very small employers, in particular, may prefer the flexibility and seeming intimacy of a "handshake agreement." But, again, the alternative to a written contract is being willing to live with whatever a judge or jury may later decide was the oral contract. Written contracts can be very brief. Often a short form of contract will incorporate by reference or attachment some or all employment policies. Alternatively, binding policies can be expressed in the contract, making that document longer but more complete.

4. Employment Status

a. At-Will Employment

The long-standing base line of American law is at-will employment. In an at-will employment contract, either party may terminate the employment relationship at any time, for any reason, with or without notice. It is perhaps the simplest and most basic contractual relationship between employer and employee. That simplicity and ease of operation make it a popular option for charter school operators. In particular, there are no specific reasons that must be given for termination and no "due process" type procedural requirements.

There are two major costs that should be considered alongside the very significant benefits of at-will employment. First, an employer must clearly communicate to employees that they are employed at-will. Most employees understand that this means they have no job security and are subject to termination more or less on a whim. As a result, many employees who are at-will are fearful, distrustful, and quick to assume the worst about their employer. Attempts to engage employees in governance, curriculum development or any aspect of policy formation may be frustrated by employee fear that frank expressions of opinion will be rewarded with prompt termination. In short, the employer who chooses

the at-will option should also spend some thought and effort on gaining the trust or confidence of employees that this power will not be abused. Of course, a direct promise that the power will not be abused will end at-will status. Fear or insecurity resulting from at-will employment can have significant side effects. Employees may be reluctant to report other legal violations – exposing the school to liabilities that may have otherwise been avoided. Internal school problems not rising to the level of liability may, likewise, go undetected and fester. For this same reason – employee fears or insecurities – at-will employment can prove to be a competitive disadvantage in recruiting employees. It should be remembered that these are risks, not necessary features of at-will employment. Many charter employers find at-will employment to be the best choice, despite these risks. Further an employer aware of these risks can take steps to avoid or mitigate them.

Secondly, at-will employment does not mean, today, what it meant 50 or even 25 years ago. The doctrine of at-will employment has weakened as exceptions have eroded its viability. In addition to many statutory restrictions on termination of employment, the common law doctrine has been severely eroded through judicial decisions. The major common law exceptions are:

The Public Policy Exception: Employers may not fire an employee for refusing to violate applicable law, nor may they fire someone for exercising rights granted to them as an employee by applicable public policy (e.g., the right to file for worker's compensation).

The Contract or "Handbook" Exception: A court may conclude that employment is not truly at-will based on application of the law of contracts. Implications against at-will status may arise through either words or action of an employer, or through the terms of an employee handbook. Either way, at-will employment can be modified if the employee reasonably relies on statements of the employers. Thus, employees may be able to enforce promises or handbook terms as part of their contractual relationship.

The Covenant of Good Faith and Fair Dealing: The covenant of good faith and fair dealing is a contract term that is supplied by law regardless of what the parties have themselves decided. Jurisdictions that have adopted the strongest version of the covenant of good faith and fair dealing have

effectively abolished true at-will employment. Weaker versions of the covenant may simply be used to respond to abuse of employer power under a pure at-will arrangement. You should determine the status of the covenant of good faith and fair dealing in deciding whether there is enough left of the at-will doctrine, in your state, to make it useful for your school.

b. Between At Will and Tenure

Tenure or civil service type protections burden employers with proving specific reasons to support discharge through trial-type procedures. At-will employment communicates distrust and insecurity to employees. Is there any option that may avoid the different but significant costs associated with this seemingly stark choice? The answer is both "yes" and "no." Forms of job security short of tenure exist. These may mitigate the problems of at-will employment. But no system is free of potential cost or risk.

The first major option is to provide a severance guarantee or notice period. This can be as simple as a two--week notice provision and as elaborate as a "golden parachute." When a longer notice period is provided – say 60 days – employers will necessarily start to be concerned about an obligation to pay an employee who has done something truly outrageous. A notice period or severance package can have a cause exception. Remember, however, that this will entail an obligation to prove cause through some due process procedure. The cost of the procedure will often outweigh the cost of the severance.

A second alternative simply extends the period of notice until it amounts to a term contract for annual or multi-year (but not indefinite) employment. This alternative may be well-suited to charter schools, since the school is only guaranteed a multi-year, not indefinite existence. Renewal at the end of the term would continue to be at-will, but employment during the term would be highly secure. On the other hand, this will obviously involve all the same considerations as tenure in any case in which mid-term termination became necessary.

A third option is to give employees procedural protections even though they do not have the status of tenure or cause limitations on dismissal. To some extent, every employer uses this option as

soon as it determines who exercises the power to hire and fire. Should this be done by the board? Should it be delegated to school leadership? Should there be a definite process of allowing employees to speak to certain issues before termination? Such process-oriented modification to at-will employment may give employees significant assurance of some "fairness" in treatment, though no particular limitation is created on reasons for discharge. Obviously, if procedural promises are made they must be followed. This will impose some time costs and risks of noncompliance, but that trade-off should be modest. If procedural limits are created, thought should be given to how to respond to an emergency – the usual option is a leave with pay while investigation and any due process is completed, but in the at-will context this is not the only option.

A final option is to create limited substantive protection that is short of cause for discharge. The most obvious way of doing this is to use anti-discrimination concepts but to simply articulate another forbidden basis for termination. In effect, instead of making the employer prove cause, this approach would allow the employee to claim use of a forbidden consideration in termination of employment. A policy might, for example, forbid discriminatory dismissal based on the appropriate involvement of the employee in policy debate or development conducted by the school. A limited substantive protection of this kind should be connected to at least an employee grievance process and perhaps a system of alternative dispute resolution, as discussed below. While this sort of protection would not limit termination at-will for other reasons, it would necessarily give the employee another basis for challenging such termination and claiming the "real" reason for action was an improper one.

Any decision to adopt an option that is neither at-will nor tenure (other than a brief notice period) should only be adopted after consultation with local counsel and review of applicable state law.

B. Hiring Process

If jobs are only offered to an "in group" of persons who happen to have knowledge about an available opening this can easily have a discriminatory effect. Since it is difficult to have a legitimate business need for not hiring the most qualified person who applies, failure to have some system of posting or advertising is difficult to defend. A founder who is employed by virtue of helping to found the

school may be an exception to this rule in some cases, but in general a school should not hire individuals without having some level of competitive opportunity for members of the public to know about a position and apply. Your posting or advertising strategy should be one that will allow a broad range of interested and qualified persons a real opportunity to apply.

Poorly drafted advertising copy can prove discrimination. Do not advertise for a "young dynamic" employee – the clear implication is that you intend to discriminate on the basis of age. Do not state employees must be in "good health" or specify the gender required (unless this is an absolutely clear BFOQ) – the first is an ADA violation and the second is clear sex discrimination. Proofread copy for any implication of race, religion, political affiliation, sex, state of health or age. From the other side, make sure that advertisement or posting states that you are "An Equal Opportunity Employer." If you know your current work force under-represents a prominent group in your community, make an extra effort to place advertising or to post positions in a way that is accessible to this group. Consider posting on the internet.

In job applications and interview, you must avoid questions that are clearly illegal or that imply any form of discrimination. Do *not*, in print or person, ask about: age, race, sex, religion, height, weight, color of eyes or hair, skin complexion, political affiliation, national origin, place of birth, length of residence, home ownership, arrest records or minor convictions (traffic or misdemeanor), military discharge or reserve status, relatives employed by the school, how the applicant found out about the job, credit problems, or personal bankruptcy. Generally questions on these topics have nothing to do with ability to perform almost any job and they are either flatly illegal or have a real potential for a forbidden discriminatory effect. ADA considerations are discussed further in that section of the manual.

Professional ability testing should only be utilized if experts that specialize in confirming the validity of such tests have reviewed the test and approved its use for the position in question. On the other hand, basic background checks and reference checking should always be utilized. State law or school district policy likely dictate the type and level of background checks a school must undertake prior to hiring. Charter school employers may be required to run employee fingerprints through law

enforcement screening procedures. Reference checks are not necessarily required by law, but good management practices suggest that employers check into references of prospective employees. However qualified or perfect an individual seems for a specific position, maintaining an absolute policy of calling references provided by the employee, as well as contacting former employers (whether given as a reference or not) is sound practice and may shield a school from liability. The tort of "negligent hiring" refers to failing to do any real checking before hiring an employee who subsequently harms another person. An employer may be found liable for harm caused by an employee if the employer failed to discover something in that employee's past that a reasonable degree of investigation would have uncovered, and if this information would have revealed a distinct possibility of the harm that, in fact, ensued.

In short, the law restricts what can be asked and sanctions asking too little. While the permissible middle ground is broad, staying within the boundaries on both sides is important.

C. Compensation

1. Salary Schedules

Most employers choose to have detailed definition of the salaries to be paid most employees and the reasons for variation. Top executive officers are a common exception. A failure to define salaries will often lead to *ad hoc* variations that may have little rhyme or reason. In some cases, *ad hoc* approaches produce variation that is not random and that readily supports a claim of discrimination based on race or gender. Without a well-considered rationale behind the salary system, a statistical or disparate impact discrimination claim will have a good chance of success. The disadvantage of fixed salary definition, of course, is that it may be more difficult to use negotiation to secure and retain a truly valued candidate. However, often salary definitions have enough 'play' to permit some negotiation. Within the broad category of defined salary determination systems, there is a further distinction and ongoing debate between the advocates of use of objective criteria (such as seniority or earned degrees) and use of more subjective considerations (such as merit). The trades-offs here are between criteria such as seniority that are most often (but not always) insulated from legal claims; and, use of pay for

performance or merit concepts, which appeal to many charter managers but also entail slightly more risk of legal challenge.

2. Merit Pay

The concept of merit pay appears to be gaining greater acceptance within general public education as a means by which an employer may either reward high performing staff or, looked at conversely, sanction employees performing at less than optimal levels. Given the attention paid among charters to issues of accountability, merit pay programs frequently strike a favorable note among charter organizers – if the school and the students are to be judged on "merit" criteria, why not employees? Two cautionary notes are in order. Much of the impetus among school districts for merit pay grows out of their frustration with tenure and other restrictions on their ability to remove non-performing teachers. For those charter schools operating outside the scope of tenure systems and collective bargaining agreements, the need for another "merit" element in employment policy may not be as strong. Implementing merit pay can also be more trouble than it is worth. Systematic studies suggest that many, if not most, merit pay plans are abandoned within a few years of implementation. Of the merit pay plans that work over a longer term, many make the merit pay a small portion of total compensation or give such pay to large numbers of employees – though perhaps that indicates the optimal mix of income security and incentive.

In any event, the practical and managerial debate exists alongside some legal risk. The most significant (though still small) risk is that merit pay will be distributed less than randomly with respect to race, religion, sex, age, or disability, giving rise to issues of discrimination. In general, merit pay plans, like seniority systems, are protected from a purely statistical discrimination case. Under Title VII (and probably under other statutes as well) an employee must show the plan has been adopted or administered so as to intentionally discriminate.[43] However, seniority (or other objectively based) plans have an advantage in that the administration of the plan is so transparent that intentional discrimination in implementation (as opposed to design) is almost inconceivable. Merit pay plans tend to have subjective

[43] 42 U.S.C. § 2000e-2(h).

components, and it is much easier to imagine a discrimination claim focused on those aspects of a plan. Finally, the rules regarding the interaction of seniority-type systems and antidiscrimination law are very well defined in case law. Merit plans, being less prominent in practice, have given rise to little definitive litigation. We do not wish to exaggerate this risk – most merit or pay for performance plans rise or fall based on nonlegal considerations and that is probably as it should be. But merit plans are *somewhat* more vulnerable to legal challenge than, for example, seniority-based pay systems.

3. Intellectual Property Issues

Teachers often create work that is useful for the school. Whether this consists of writing curriculum, writing a new test, or compiling classroom materials, the result may be a document in which someone can hold a 'copyright.' A copyright gives the party that owns it control over the use of the copyrighted item. Copying such material without the permission of the copyright holder (normally the author) gives rise to serious civil and even criminal sanctions under federal law. In general, if an employee prepares a document as part of the job it is considered a "work for hire." That is, the employer is considered to have paid for the copyright by having paid for the work. However, the more scholarly the work, or the more it involves an employee taking initiative away from "the job," the more question there may be about whether it was a work for hire or constituted an activity independent of the job. As a practical matter, such work often has little economic value. Rather than assume that the work for hire rule covers the issues, an employer may adopt a written policy or contract provision that deals specifically with copyright issues. In this case, the school may want to give employees some of the benefit of any intellectual property they produce.

4. Enrollment Preferences

Many schools have a number of enrollment preferences (where allowed under state law). An example is exempting siblings of enrolled students from lottery procedures. Some schools extend a similar preference to children of staff, making this a benefit of employment. Even where such practice is allowed under state law, federal law dealing with eligibility for Title X federal start-up grant money restricts eligibility to schools that use a lottery to fill openings after reaching capacity. The U.S. Department of Education has issued non-regulatory guidance identifying certain exceptions to the lottery requirement. Siblings of existing students and children of school founders are among those exceptions, while children of staff are not. However, this does not appear to be a more dramatic departure from the concept of a "lottery" than the exceptions that have been recognized. Whether DOE will allow enrollment preferences for staff in Title X schools is not clear.

D. Conflict of Interest

A charter school is an entity. In law, it will often be considered a "person," particularly if it is organized as a non-profit corporation. When natural persons serve on the governing body of a legal person – such as a corporation – they assume duties to that person – to the entity. These are commonly referred to as a *duty of care, duty of loyalty* and *duty of obedience.* The *duty of care* requires governors to exercise reasonable care as stewards of the organization. In effect, if the organization were a natural person what reasonable and cautious actions would it take on its own behalf? This point of view informs the duty of care. The *duty of loyalty* refers to having undivided allegiance to the organization. Board members should never be acting out of purely personal motivation – and especially not for personal gain – but instead should pursue what is best for the organization itself. The *duty of obedience* requires a board member to be obedient, or faithful, to the mission of the organization.

Obviously, when a governor is also an employee, there is a potential for 'conflict of interest,' particularly with respect to the *duty of loyalty.* This is, of course, not just an issue for employees. Any person who has both a governing role and any other role in relation to the organization may develop a conflict of interest. Further, conflicts of interest are not just financial – they can involve any interest a person has in a role other than organizational governor. Thus, a parent would have a 'conflict of interest' if the issue before the board concerned the grades or school discipline of his or her child. A person representing a university, city or any other entity will have two duties of loyalty, which may come into conflict – a classic example is the person on two nonprofit boards who finds him or herself in a position to make a plea for money to a foundation. If this board member gives precedence to *either* organization, he or she violates a duty to the other organization. And, of course, anyone who has a present or potential economic relationship with a school – as its lawyer, accountant, and curriculum advisor – has just as direct an economic conflict of interest as an employee. In addition, conflicts of interest are often defined to include transactions that would benefit certain family members. Though it is sometimes said that one should recruit board members with no potential conflicts, this is often not practicable. Any person who cares enough to spend the time to be a board member is a person who is

likely to have some *potential* conflict of interest. The key is to recognize and respond appropriately to conflicts when they arise, not to assume that people can be found who have no interests in life apart from board membership.

If a school is organized as a non-profit corporation, state corporation law will probably have applicable conflict of interest rules. Chartering authorities may also have standards for conflict of interest issues. The State education code may have applicable provisions. While the specific law will vary from jurisdiction to jurisdiction, several common themes can be found. At a minimum, any board member who has a conflict of interest should *formally disclose* their real or potential conflict. That is, a board member should inform other board members and make sure a record exists that the board as a whole was informed of the actual or potential conflict of interest.

In almost every case, it is best for board members with an actual conflict of interest *not to vote* on the issue that gives rise to the conflict. An exception to this rule – sometimes called the *rule of necessity* – may exist (again, the rules may vary by jurisdiction). The *rule of necessity* would allow a member with a *disclosed* conflict to vote only if this was needed in order for the entity to be able to take some sort of action (e.g., to break a tie). Unless board members are certain that local law allows it, they should never vote on a matter in which they have a conflicting interest.

In some cases, it may be wise for the board member with a conflict to abstain from participation in discussion and even to leave the meeting while a matter on which they have a conflict is being discussed. Boards should *not* order individual members to do this without checking local rules and organizational bylaws on (1) maintaining quorums for action and (2) the rules on holding public meetings. Some state laws specifically allow members who do not vote due to conflict to still be counted to meet a quorum, for example, and a board member with a clear second role (e.g., as a parent or an employee) may have a legally enforceable right under "sunshine law" concepts to be present while their interest is decided. But in some cases, individual board members may feel it is wise to minimize their involvement in a particular issue in every way possible and to absent themselves from part of a meeting.

The implications of these rules for teachers or other employee governors are numerous.

Obviously, teacher board members should disclose a conflict and should not vote on their own contracts, their own salaries, etc. Employees on a governing board may need to participate with care in general budget discussions and votes, lest their position be interpreted as trying to indirectly determine terms of employment that they cannot vote on directly. Planning, particularly in potential reduction in force or reorganization contexts, may well require teachers to abstain from voting. Perhaps most perplexing is the involvement of a board member/employee in evaluating the performance, or deciding on future employment, of their own supervisor. In general, it may be safest to treat this as a conflict of interest, since the employee who votes against their supervisor obviously takes a rather severe practical risk.

If a board member – such as an employee – votes on a matter that would raise a conflict of interest, this does not necessarily mean the action is invalidated. It may be very significant that other board members who did *not* have a conflict also supported the same measure. A court may also ask whether the measure was objectively in the best interests of the organization – what is good for a school, after all, will often be good for its teachers as well. But the best protection against conflict of interest is to *disclose* any duality of interests and for the board member with dual interests to *abstain* from voting. Further, in the context of employees who serve on boards, it may be wise to have a policy that defines certain issues as ones on which employee-governors are automatically considered to have conflicts of interest and will not vote.

State laws may place additional restrictions on certain categories of board members with potential conflicts (such as employees), or may mandate certain governing involvement by employees.

E. Employee Evaluation

Most American employers use formal systems of periodic employment evaluation. State law or chartering authority policy may require such evaluation. One prominent business academic, W. Edwards Deming, has been a severe critic of formal evaluation and suggests that typical evaluation systems cause far more harm than good. Assuming one is not a devotee of the Deming school, one should at least be sure that evaluation systems do not cause legal headaches. Problems often arise in the

form of discrimination cases and the features of evaluation systems that are most likely to cause a discrimination problem are readily identified. First, an evaluation system that is highly informal or ill-defined is likely to be indefensible. That is, if such a system has a statistically significant discriminatory effect, it will be difficult to show that the system has a real business purpose. Second, systems that rely upon vague or subjective criteria or vest evaluation in individuals not given appropriate or standardized training are likewise vulnerable to producing indefensible results.

Employees should be allowed to review the results of their evaluations and there should be some system for employees to record any disagreement or ask for further review. One danger of evaluation is that evaluators may consistently encourage a marginal employee by praising the positive aspects of his or her work. If the employee is later terminated based, in part, on poor performance, these evaluations will come back to haunt the employer as evidence of high quality performance. The evaluator who tries to explain after-the-fact (that is, in litigation) that a teacher's performance was not as the evaluator described will be easily portrayed as dissembling and unreliable. On the other hand, giving marginal employees evaluations that are brutally frank can be very discouraging and not a good route to improved performance. Perhaps Professor Deming was onto something.

On the other hand, if a school were serious about insisting on high quality work from students, it would seem that consistency requires some similar measure of accountability for teachers. Thus, for example, some schools that use portfolio-based assessment of students may want to model what they expect for students with portfolio-based assessment of teachers. In any case, employee evaluation should be purposeful, carefully planned and consistently administered.

F. Employment Policy Development and Upkeep

As employment practices are reduced to writing, it is important to be sure the writing does not become of mere archeological interest. Employment policies should be given to employees at least annually. Employees should be strongly encouraged to read and review policies. Employees should be invited to seek explanation of any unclear policy. New managers or board members should be given their own personal copy of the policies. Periodic training or formal review of policies by the board and

managers should be encouraged in order to keep past decisions and commitments well in mind. Any uncertainties or ambiguities in the policy should be reviewed with an eye to making sure there is a common understanding of policies throughout the organization. Policies should not be written for their own sake – not every issue can or should be anticipated and room for the future exercise of judgment or discretion is not bad by definition. Thus, policy review may cause a board to eliminate extraneous writing and not just add to an ever--growing corpus.

If your school conducts a regular review of its operations – such as a board or staff retreat – employment policy questions should be a regular agenda item.

G. Grievance Systems and Alternative Dispute Resolution

Suppose one employee tells another an offensive joke or story. This may seem like a trivial incident or even a "private" matter. On the other hand, it may turn out that this was only a small part of a large pattern of behavior by many employees, including managers, deeply offensive to – even used to harass – other employees. How does an employer become aware of when the seemingly trivial has escalated into a matter of greater concern and even legal risk? How can an employer resolve workplace disputes before they fuel litigation, without becoming entangled in every chip-on-the-shoulder complaint? The traditional answers to these questions involve employee grievances systems and alternative dispute resolution, or ADR.

1. Employee Grievance Systems

Most employers have a defined grievance or complaint system of some kind. In many cases employees do not use such systems because they fear retaliation or believe their complaints will be given biased treatment. Employees who do not feel the official system of "voice" will serve their purposes may well resort to other methods – litigation, organizing fellow employees or even parents, or even sabotage. To expect a grievance system to be effective, an employer must have a serious commitment to hearing even unjustified employee gripes dispassionately, investigating complaints fairly, settling matters quickly and providing a true remedy if a real problem is discovered.

Why bother with a grievance process? Simply, a school's self-improvement is significantly tied

to its ability to understand its shortcomings and improve upon them. Grievance procedures can provide employers with perspective that they may otherwise not receive. Standard lines of communication can break down, leaving those in charge with something less than a clear picture of what is happening at their school. A properly devised and executed grievance policy provides a secondary line of communication that may prove invaluable to an employer. If the commitment to a grievance system is serious, there are several options for implementation.

A chain of command system requires employees to go through the existing hierarchy to have their complaint heard. An advantage of this approach is that a manager will not be surprised to have a complaint they had never before heard first aired with a superior authority. A disadvantage is that if the complaint is about the manager, employees will be especially reluctant to initiate a grievance. If a chain of command system is used, the system should have some "safety valve" alternative for certain serious complaints about the manager (such as allegations of sexual harassment).

An 'open door' system makes it clear that employees can bring any complaint to any of a number of persons in positions of authority. An advantage is that employees have more opportunity to find someone they are comfortable talking with. A significant disadvantage is that employees may try to manipulate one manager or board member against another. Also, the appearance that the 'door' is open will often be interpreted differently by employees – the idea that one manager will readily second guess another is often doubted by line employees.

An 'ombudsman' system identifies a particular person whose job is to handle employee complaints. This system is probably more suited to large organizations, but may be an alternative some charter schools could consider. Some organizations train and authorize particular line employees to serve as an ombudsman for their peers.

In many cases, employees may be as concerned with the ultimate authority as they are with the initial level of a grievance or complaint procedure. A procedure for 'appeals' gives more consistency, appearance of fairness and thoroughness to a grievance process. In small nonprofit organizations, the governing board is often the final 'court of appeal' for employee complaints. This system, though

conventional and widespread, often leaves employees unwilling to really pursue solutions for ongoing problems with management. Some organizations create a specialized review board that may include, or even have a working majority, of line employees.

2. Alternative Dispute Resolution

Alternative Dispute Resolution, or ADR, has become a sizable industry in the United States in the last 20 years. The "alternative" in ADR refers to the court system. ADR is any method for finally resolving a dispute *in lieu* of going to court. While grievance systems are in a sense a form of ADR, normally ADR refers to utilizing some "third party" or "neutral" to the original dispute – and thus not to systems that exist strictly within or under the managers or board of directors of a corporation. ADR systems mean giving up some control over internal complaints – and perhaps lowering the threshold for pursuing complaints – in return for getting disputes resolved without resorting to court.

a. The Traditional Dichotomy: Arbitration vs. Mediation

The most common forms of ADR have been around for millennia. They are "arbitration" and "mediation." Arbitration is simply the designation of a third party as a kind of private judge to hear and decide a dispute. The decision is normally final, so that the term "binding arbitration" is somewhat redundant. However, the term "arbitration" has been somewhat abused over the years, and systems of so-called "advisory arbitration" also exist. Arbitration often looks like a court proceeding, with witnesses sworn, evidence admitted, and lawyers making arguments. However, some forms of arbitration deliberately break with judicial practices and use other methods to reach a binding result. True arbitration involves no appeal. It has been said that arbitration is like having a final decision of the Supreme Court. Only such extreme grounds as bribery or fraud of the arbitrator are likely to justify setting aside an arbitration award.

Mediation is really a form of assisted negotiation. A mediator has no authority to decide a case. Mediators are often very skilled at listening to the concerns of different parties, detecting underlying points of common interest, and trying to 'brainstorm' solutions that are acceptable to both sides. If, however, a dispute is clear and can only be resolved by one side 'winning' and the other 'losing,'

mediation is often unproductive.

b. Alphabet Soup

In the last 50 years – and especially in the last 15 years – an entire range of ADR practices in addition to arbitration and mediation have developed. *Fact-finding* (which is sometimes called advisory arbitration) consists of a neutral listening to formal presentations by both side – often in court-like proceedings – and then making formal findings and recommending a resolution. In *incentive arbitration*, the result is not strictly binding, but the arbitrator has authority to levy a penalty on the party that refuses to accept the result. A *confidential listener* receives suggested solutions from both sides without reporting them to the other. If the two suggestions meet certain criteria, the listener then tells both parties what solution they agreed upon. This method is most useful for financial disputes. *Med-arb* involves a neutral as a mediator in the first stage of the process and, if this fails, then authorizes the mediator to become an arbitrator and issue a decision. *Multi-step ADR* arranges several procedures seriatim in some strategic fashion. A party considering a system other than simple mediation or arbitration should consult an attorney with ADR experience or a dispute resolution expert in designing such a system.

c. 'Arbitrability'

An ADR system need not be open to every chip-on-the-shoulder complaint. Typically, the system will have some definition or description of the jurisdiction of the neutral or third party. In arbitration, this concept is called 'arbitrability.' Before adopting an ADR system you should have a clear idea of what is being made 'arbitrable.'

d. Legal Status

Historically, courts were hostile to ADR. With dockets overflowing, that attitude has changed. A uniform statute on arbitration has been adopted in many states. However, in many states the existing precedents on use of ADR are complex. In the public sector, in particular, there may be concerns with whether a particular form of ADR improperly 'delegates' political or 'sovereign' power. A charter school that designs an ADR system should become familiar with the ADR ground rules in its jurisdiction.

e. Federal Anti-discrimination Law

There is an ongoing debate over the interaction between ADR practices and federal anti-discrimination law. While the court cases seem to be favoring most ADR efforts, it should also be clear that ADR cannot be used as a shield for discriminatory conduct. After all, the EEOC and state enforcement agencies will not have signed the ADR clause and, if abuses really exist, may still pursue remedies even if an individual employee cannot. On the other hand, a fair ADR process that uses a true neutral may be a method for more efficient and final resolution of discrimination complaints.

f. "Interest" Disputes

Just as ADR need not follow court procedures, it also need not be limited to issues that could be decided in court. So-called 'rights' or 'grievance' ADR usually concerns issues that could or would (or might still) go to court. 'Interest' disputes or ADR concerns, on the other hand, issues that parties have decided to resolve through a neutral even though no court claim could exist. Examples of 'interest' disputes include finalizing the terms of a contract that the parties otherwise agree should exist (baseball salary arbitration is a well-known, if somewhat notorious, example). 'Interest' disputes are the ones most likely to raise issues of improper delegation of public authority to a private neutral.

H. Ending the Employment Relationship

The process of terminating employees will generally require a formal decision at a high level of the organization. This may involve compliance with state public meeting or "sunshine" laws. It may also involve compliance with school organizing documents (such as articles of incorporation or bylaws). These situations vary from state to state, even school to school, and should be reviewed carefully whenever a termination may be at issue.

Termination of an employee may bring with it scrutiny and hard questions about the basis for termination of that person. A charter school's public – staff, parents, students, chartering authority and others – does not always know all the facts that went into a board's decision and are not privy to all the discussions. In some cases it may violate privacy rights of the employee, risk defamation claims, or raise due process issues for the facts to be made public. (The discussion below about reference checks covers these issues in more detail.) Yet those who knew a particular school leader, teacher or, for that

matter, janitor, may care immensely about the school and may have established relationships with the terminated staff member. The potential for an emotional reaction to employee termination is real and should not be overlooked while attention is also being paid to treating the employee appropriately and complying with what are often awkward legal requirements.

1. Reorganizations

Lay offs, downsizing, restructuring, reduction-in-force and other euphemisms are used when an employer terminates employment not because of anything the employee did or did not do, but simply because of the organizational needs of the employer. Laid off employees are entitled to unemployment compensation. Lay offs often raise the issue of whether an employee's job can be saved by giving them preference over another employee (called "bumping" if there is a clear transfer from one job position to another). In general, tenured employees or employees with other job security guarantees should be considered to have preference over at-will employees who lack any job security status, provided only that the preferred employee has appropriate qualifications for the job. Preferences among at-will employees should be determined as objectively as possible. An employer may want to clearly separate into two sequential steps the process of designing a reorganization and the process of selecting the employees who will remain. Again, an inability to point to reasonable and demonstrable criteria for preference may result in a successful claim of some form of discrimination.

2. Employee Misconduct

One of the common mistakes employers make – often in writing policies, handbooks or contracts – is to assume that they already know all the ways their employees may misbehave and what labels or terms will capture these forms of misbehavior. In fact, employee misbehavior is stunningly diverse and at times bizarre. It is a mistake to assume that all misconduct can be anticipated and neatly classified in advance. Indeed, this is one reason that many civil service systems, tenure laws and union contracts allow for discipline or termination based on "just cause," "good cause," "sufficient cause," or "cause." (An at-will or modified at-will employer will want to avoid these terms – perhaps using "with or without cause," instead.) Of course, a term such as "cause" is entirely open-ended. An employer may

well want to give employees firm directions regarding some common forms of misbehavior – and there is no reason this cannot be done. It is simply important to remember that directions to employees should never state or imply that the employer is only concerned about the behaviors being discussed or is in any way restricting the power to respond to unexpected but clearly inappropriate behavior.

The problem of classification also arises when employers (or legislators) try to describe the line between the misbehavior that may result in a warning or minor discipline and that which will immediately lead to termination of employment. Labels such as "insubordination" and "dishonesty" and even "absenteeism" each describe a broad range of conduct – some intolerable, some minor, some barely within the category at all. Thus, again, attempts to describe in advance which workplace sins are to be considered venal and which mortal is difficult and fraught with a potential for being interpreted in unexpected ways when the unexpected occurs.

With those cautions, the following list provides one way of classifying or looking at the most common forms of misconduct that will prompt an employer to consider terminating an employee.

_Absenteeism and Tardiness

_Negligence or Carelessness

_Dishonesty

- _Falsifying Documents
- _Theft

_Insubordination or Disloyalty

_Abuse of Students, Patrons, Co-workers and Others

- _ Horseplay
- _ Abusive Language
- _ Discrimination
- _ Child Abuse
- _ Sexual Abuse
- _Fighting

_Drug and Alcohol Issues

_Possession

_Sale

_Use

_Safety Violations

_ Smoking Rules

_Off-Duty Misconduct

For the employer subject to tenure or similar considerations, each of these topics will raise different issues of determining what justifies discharge and what constitutes reliable proof of the offense. Even for at-will employees, it may be important to have a clear understanding of expectations and procedures in several of these areas. Some of the more common pitfalls are discussed below. With at-will employees, obviously, it must be clearly stated that while certain misconduct will definitely result in serious consequences, this in no way serves as a limit on the employer's authority to terminate an employee for other reasons or some combination of reasons.

a. Absenteeism and Tardiness

A single absence or tardy is rarely considered enough of a reason to discharge a valued employee. If, however, a pattern develops it may be necessary to counsel an employee on expectations for attendance. Many employers have well-defined standards for how employees must report or justify absences or tardies, how many incidents give rise to serious counsel and what will, if counseling does not succeed, result in discharge.

b. Insubordination and Disloyalty

In the unionized sector, most employer decisions to terminate employees have been subject, for many decades, to being second-guessed by arbitrators. Studies of these systems have shown that arbitrators uphold a sizable majority of termination decisions. An exception to this pattern is found when employees are terminated for "insubordination." Far more commonly than with other grounds for discharges, arbitrators are likely to find that discharge was an over-reaction to conduct labeled

insubordinate.

A further difficulty is that the word "insubordinate" covers a vast range of very different forms of conduct. Thus, for example, it is black-letter arbitral law that "theft" from an employer is cause for discharge, in every case, if proved. It is also universally understood that a single tardy is *not* cause for discharge. "Insubordination" does not fit any such rule – sometime it is cause for immediate discharge and sometimes it is not. In general, employers should simply keep in mind that there is a well-documented tendency to allow emotion to influence the reaction to insubordinate conduct and to take what may be hasty and disproportionately harsh action.

c. Discrimination

The employer's duty not to discriminate includes taking corrective action when employees are found to be engaged in discrimination. This may be particularly important in the case of sexual harassment, where a pattern of failure to respond to complaints may make the employer liable for the resulting "hostile environment." However, it is important to remember that correcting employee misconduct may or may not take the form of termination.

d. Drug and Alcohol Issues

Schools should either have a written drug and alcohol policy or adopt and follow the policy of an authorizer. The issues involved in dealing with substance abuse can be difficult. Simply being sure of when you might use a drug test and how you can be sure the test is reliable are subjects fraught with complexity. You can, as an employer, forbid possession, use, distribution, and being under the influence of illegal drugs or alcohol while at work. You *cannot* discriminate against former or recovered alcoholics or addicts or persons who are actually in voluntary rehabilitation. Your response to off duty use of alcohol may have to vary according to the circumstances and may involve significant variations in local law. Different employers also make significantly different choices about whether and how to encourage employees with substance abuse problems to voluntarily seek assistance. In short, this is both a technical area in which detailed consultation with counsel may be wise and an area in which different employers can make very different, but legitimate policy choices.

e. Off-Duty Misconduct and Appearance Rules

Employers often become aware of employee conduct away from work that causes them concern or prompts them to take action against the employee. The range of off-duty "misconduct" is vast and includes everything from the most trivial and private matter that is accidentally discovered, through behavior which is not ideal but entirely lawful, all the way to conduct which is unmistakably unacceptable to any school employer. Thus, the extent to which employers should be able to regulate an employee's life away from work is both a properly sensitive issue and a controversial one. Again, state and local law varies. However, as a rough rule of thumb, it is always appropriate for employers to ask what connection, or "nexus," exists between off-duty misconduct and the work at issue. The more clearly an employer can articulate why off-duty misconduct is undermining the *employer's* ability to fulfill its mission, the more likely it is that such misconduct, even though it occurred away from work, will be a legitimate concern of the employer's. Beyond this, each case should be considered on its own merits. Because of the privacy issues often implicated in such cases, consultation with counsel is generally advisable.

Employees often think of personal appearance as involving their individual "rights." While excessive employer regulation of appearance may give rise to a valid claim, courts have been sympathetic to employers having some control over the image that they project, through employees, to patrons and the public. One area of more specific limitation should be noted. If an employee's religion requires certain apparel, the employer should consider whether that religious practice could be reasonably accommodated even if it results in a violation of an otherwise valid regulation of employee dress or appearance.

f. Disability vs. Cause

Finally, disability issues are *not* generally understood to be an example of termination for "cause," since disability does not carry a connotation of fault. Employers facing an employee who may be work-disabled, should look to both Section 504 and ADA (for purposes of analyzing the duty to accommodate) and to the standards of any disability retirement plan (for purposes of analyzing what

options the employee may have). With tenured employees, state or local law may prescribe more specifically what the standard is for disability-based terminations.

3. Resignation Issues

Resignation voluntarily terminates employment – or so it would seem. Thus, a *valid* resignation eliminates any claim for breach of contract, violation of civil rights, or violation of any other rights *in connection with the termination*. A resignation does not necessarily extinguish any claim that existed *before* the termination of employment – though the occasion of a resignation may be an opportunity to wrap up such potential pre-existing claims.

Despite this, there are three common sources of difficulty in connection with resignations. First, employees sometimes change their mind about resigning. Thus, an employee may try to withdraw a resignation. This raises a question of what is necessary to resign. Must the employee submit something in writing? Does the governing board or some other authority have to "accept" the resignation? Are resignations only effective upon a certain period of notice? If a written resignation is required, or a notice period is imposed, or the organization reserves the right to "accept" or "reject" resignations, then an employee may be perfectly entitled to act upon second thoughts and withdraw a resignation until all conditions have been satisfied.

The safest course is to make resignations final and irrevocable as soon as they are submitted (even if they have a later effective date). It is also, however, probably wise to require a written communication of resignation since oral resignations can give rise to disputes over what really happened. Confusion or uncertainty about resignations can only promote gamesmanship or feed unhealthy uncertainties. A valued employee who resigns for ill-considered reasons, on the other hand, could always be re-hired if he or she truly changes his or her mind.

a. Constructive Discharge

The second major issue raised by resignation is "constructive discharge." A "constructive discharge" can be thought of as a forced resignation. Though the form of termination is a resignation, the employee is claiming, in effect, that he or she was really fired. Under some circumstances a

constructive discharge can be a wrong in itself. More commonly, proof of a constructive discharge simply allows the employee to turn the resignation into a firing and then complain about the firing on some other basis (e.g., breach of contract, unlawful discrimination, etc.). Constructive discharge can involve confusion about the real form of termination. The "You're fired!" "No, I quit!" scenario is sometimes referred to as constructive discharge. It is more properly considered an issue of determining what happened. Again, if the required form of resignation is clearly stated, requires a writing, and is effective immediately, this question will rarely arise.

In most cases, constructive discharge involves a clear act of resignation and a claim of circumstances amounting to duress. As with other claims of duress, constructive discharge is difficult to prove. In most jurisdictions, at a minimum, the employee must show that conditions of work were so intolerable than a reasonable person in the employee's situation would have felt compelled to resign. Some jurisdictions also require that the employee show that the employer intentionally made conditions intolerable or intended to force a resignation. Employees are most likely to claim constructive discharge in cases involving harassment, demeaning or inappropriate transfers or assignments, or other acts involving humiliation or clear demonstrations (or even statements of intent) to drive out the employee. An employer should never write a resignation for an employee, as this can be construed as virtually ordering the employee to resign. Conversely, a number of circumstances can tend to show that a resignation was valid and should not be considered a constructive discharge. These include:

_ The employee being given time to consider whether to resign.

_ The employee being told they have the right to seek counsel or advise before resigning.

_ The employee being given some negotiated benefit (e.g., severance pay or settlement of another claim) in connection with resignation.

In sum, while resignations seem to be the best available protection against termination-related claims, the act of resignation can be confused or abused. While constructive discharge, in particular, is difficult to prove, the employee who succeeds in proving it will almost certainly have the sympathy of a judge or jury as other issues are decided – no one likes to see employees deliberately humiliated or

manipulated. It may be better to take the action necessary to fire an employee – particularly an at-will employee – than to leave standing real uncertainty about whether the employee voluntarily quit. An employer should *never* attempt to force a resignation. On the other hand, an authentic resignation remains the surest protection available against a claim of improper termination of employment.

b. Abandonment of Employment

The mirror image of constructive discharge is what might be called constructive resignation, or abandonment of employment. Employees sometimes leave their work without formally resigning. An employee may walk out in a huff and not return, promise a written resignation but never deliver it, fail to show up for the first day of work (or the first week or month), or just disappear. In all of these circumstances an employer may at some point infer that the employee has "quit." The other alternative is to view failing to appear at work as misbehavior justifying discharge. In general, an employer should not assume an abandonment of employment unless: (1) there is a clear communication of some intent to resign or quit, combined with (2) an action that appears to fulfill or carry out that intention.

Some employers solve this problem by adopting a definite rule for how many days of absence without explanation ("no call/no show") will be conclusively construed as "quitting." Whether it is wise to adopt such a rule depends upon the context. If employees are protected by statutory tenure, collective bargaining or similar structures, an employer may or may not be free to treat abandonment as quitting (if not, it will be "cause" for discharge). In short, this problem is common enough that existing systems usually account for it in one fashion or another and it is simply important to understand which pigeonhole a case fits into. With at-will employees, it is easier, but less necessary, to adopt a "no call/no show" rule. After all, an at-will employee who stops showing up can simply be terminated at-will.

Finally, the abandonment problem should not be confused with two more specific topics: disability leaves or retirement (including FMLA leaves) and the right to strike. Though employees who are very ill or on strike do not show up for work, it is obviously not the intention of employees in these circumstances to "abandon" employment. It would be imprudent at best to treat striking or sick

employees as instances of "abandonment."

4. Last Chance Agreements

In recent years, employers have developed a powerful new tool for dealing with employees who are not performing appropriately or who engage in repeated but not severe misconduct. The employee is notified that their performance or conduct is unacceptable and that they are subject to being terminated. In lieu of termination, however, the employee is offered a "last chance agreement." The last chance agreement should clearly articulate what the employee must do (or not do), preferably in very objective, difficult-to-dispute terms, for a period of time (often a year), in order to maintain their employment. In exchange for this "last chance," the employee agrees to give up any and all legal claims they may think they have against the employer. A properly drafted – and justified – last chance agreement is an extremely powerful risk management device and may also be the firm, unequivocal warning an employee needs in order to straighten up. Courts have upheld last chance agreements. Courts have blocked discrimination claims by employees who signed last chance agreements. Courts have even overturned binding arbitration awards – as outside the power of the arbitrator – that did not follow last chance agreements. Certainly, not every incompetent or misbehaving employee should or even can be given a "last chance." If, however, a troubled employee appears salvageable, a last chance agreement may be both the message the employee needs and the protection against litigation the employer needs. Of course, an employer must be comfortable that the employee may, in fact, live up to the agreement. In that case, the employee is, at least for the period of the agreement, more than an employee at-will (in exchange, of course, the employee has taken the risk of being even less than an employee at-will if they violate the terms of the last chance).

I. Post-Employment Issues

1. Covenants Not to Compete

Private employers, particularly those with sensitive or propriety information or carefully cultivated client bases, often require employees to sign covenants not to compete. These are agreements by the employee that if they leave employment, they will refrain from working in the same

field and geographic area for some period of time. Covenants not to compete are not often seen in the public sector and may give rise to serious policy questions. However, charter schools that feel their very unique approach to education is at risk from unfair competition by former employees could consider drafting a covenant not to compete, particularly for top level managers. The validity of covenants not to compete is very dependant upon reasonableness – that is, the size of the area covered, the period of time covered, and so on. A charter employer should only utilize a covenant not to compete with advance clearance from counsel who has reviewed the law in their jurisdiction.

2. Employment References and the Law of Defamation

As an employer you want accurate and candid references from others and should try to give accurate and candid references to others. Yet employers can be subject to liability for defamation regarding any statements made about current or former employees. Defamation is the making of (1) a communication to someone other than the defamed party, (2) that was false, and (3) that tended to harm that party's reputation or to lower their estimation in the community.

As implied by the definition, only false statements are actionable. True statements, no matter how damaging, are not. Some degree of fault is typically required – that is, the employer must either know the statements were false, have reason to know the statements were false, or at the very least have been negligent in determining the truth of their statement. There is a difference between statements of fact and statements of opinions; harsh, excessive, or mean-spirited statements of opinion are not actionable. However, if an opinion clearly implies or includes false facts, the label 'opinion' may not provide much protection. The law recognizes the necessity of certain communications between former and prospective employers, and extends some additional protection from defamation to activities like reference checks.

Charter schools should take several steps in managing employment references. First, carefully specify and train the person at your school that is authorized to provide employment references and prohibit anyone else from acting in that capacity. A secretary should not be gossiping about former employers when the school manager has carefully prepared what should be said. Second, the person

giving an opinion should make sure the distinction between opinion and fact is clearly identified to the listener. Third, the person giving a reference should only report unfavorable facts if they are sure the facts are true *and can be proven to be true*. If there was a conflict about the true facts, do not report one side, or even your best guess, as if there were no dispute. Fourth, in any discussions, keep comments to the issue being discussed and ensure that the audience is limited to those appropriately taking part in the discussion. Fifth, reference checks are about employee qualifications and not whether Joe was good to play golf with or a lousy member of the school softball team. Stick to what is relevant when talking to others about employees.

Obviously, your jurisdiction may well have rules on the privacy of employment records that limit or structure how any information about an employee is shared with others. These rules will typically permit reference checks, but it is important to be sure you are in compliance with privacy standards. Finally, if you make defamatory statements about a former employee to the public (and not just to prospective employers), the employee may have a "due process" right to insist on a "name clearing" hearing. In other words, keep reference checks private with the person or persons who can properly make inquiries.

VI. Conclusion: Law vs. Practice -- Are There "Best Practices" In Employment?

School employment practices have been the subject of sharp criticism – often based on supposed "superior" practices of private sector employment. There can be no doubt that ripe targets for critique and reform exist. At the same time, the models held up for schools to follow are often dubious. Private sector employment practices have been in a state of ongoing ferment for at least 20 years. Today, advocates of high involvement workplaces take aim at their counterparts who promote contingent employment and virtual corporations, and *visa versa*. Systematic employment evaluations are urged by some, incentive systems by others – but others in the private sector would scrap both practices as inherently misguided and organizationally destructive.

Separating any wisdom that might be gleaned from the private sector (or comparison with other public sector employers) from today's fads and yesterday's foibles would require a volume longer and more complex than this one. Consider one small area of systematic study. There are now numerous studies from the private sector showing that the existence of an employee grievance system has a strong positive correlation with productivity. But another batch of equally impressive studies shows that when employees actually use a grievance system regularly, productivity plummets.[44] The lesson would seem to be that it is good to have a grievance system, as long as it isn't used. This conclusion is difficult to translate into a policy or practice that can be replicated – and our somewhat tongue-in-cheek conclusion may not be correct. It may be that factors other than the grievance system (or its use) are really at work and that evidence of correlation between grievance systems and productivity are a byproduct of a more fundamental issue of cause and effect – and these may involve more ephemeral and subjective qualities, such as trust, loyalty and fairness or the perception or fairness. So what is the "best practice" when it comes to employee grievances? There is no obvious, incontestable answer. In this detail and dozens of others, private sector wisdom about employment is both elusive and changeable.

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[44] David Lewin, *Theoretical and Empirical Research on the Grievance Procedure and Arbitration: A Critical Review*, in Adrienne E. Eaton and Jeffrey H. Keefe, eds., EMPLOYMENT DISPUTE RESOLUTION AND WORKER RIGHTS IN THE CHANGING WORKPLACE 137 (IRRA 1999).

At the same time, charter schools are charged with being innovative, taking different approaches to fundamental issues, and taking reasonable risks. Employment is the largest part of any school's budget and an obvious area in which non-educational issues may either interfere with effective education – or make a positive difference. The search for more effective schooling must involve questioning and reconsidering existing employment practices.

Is There a "Grammar" of Teacher Employment?

Reform is not new to American education – national calls for changing the educational *status quo* can be traced at least to 1890 and the very creation of widespread schooling was a reform of its own before then.[45] Many of these efforts have either seen little success; or have seemed to succeed for a few years in a few places, and then faded away; or have begun with seemingly revolutionary impact, only to be absorbed and assimilated into some part of the existing system over time.

Why have there been so many proposals for change and so few truly distinctive and lasting results? Professors Tyack and Cuban suggest that the American K-12 system has a powerful existing and evolved "grammar" – an underlying and almost invisible set of rules and interlocking expectations – that operates as an almost automatic brake on any dramatic change. Though Tyack and Cuban are more interested in pedagogical reform, their point can be extended by analogy to teacher employment practices. People attracted to the teaching profession, after all, were once students. As students they observed their teachers' lives and jobs and found something attractive in them. This "something" may have involved the chance to influence the young, or the nature of the job schedule and pay, or a certain freedom and power within the classroom, or a fascination with the particular subject being taught – and most likely it involves a combination of many factors, both selfish and altruistic, "good" and "bad." What almost inevitably results is a high level acceptance of some part of the "teaching" *status quo*. Why become a teacher if you did not find school, as it presently exists, of some value? Dramatically changing the expectations of teachers, then, is likely to be a frustrating task.

Furthermore, some of the habits ingrained in teaching employment reflect hard practical realities. The amount of time that can be fruitfully spent focused on certain tasks, the number of children of a certain age who can be controlled by one adult, or the amount of money it takes to live reasonably well are not variables a school or policy maker can alter at-will. Indeed, Tyack and Cuban document case after case in which reform appeared to be a resounding success for some students, for a while, but ultimately lacked the ability to last or "stick." Today's practices are always yesterday's ideas that

[45] *See, e.g.*, David Tyack and Larry Cuban, TINKERING TOWARD UTOPIA: A CENTURY OF PUBLIC SCHOOL

worked well enough to continue – sometimes for good reasons, sometimes for the wrong reasons. The perception that 'the wrong reasons' are at work at times prompts reformers to propose ideas anew – as it should. But finding *the* new ideas that will become tomorrow's practices (for the *right* reasons) is a difficult task.

Part of the answer to addressing such issues of reform and practice lies, necessarily, in the law. The law establishes boundaries – some clear and firm, others contestable or vague – for the range of possible or permissible practices. A sound grasp of these boundaries – which we hope we have partially outlined – will, at least, allow reformers to imagine what might be done differently and then ask, "why not?" The other part of the answer lies beyond the scope of this volume, but will inevitably be a subject for reflection by every thoughtful charter school governing body and administrator.

REFORM (1995).

VII. Employment Policy and Contract Checklist

Each charter school should review the policies of the chartering authority, the internal policies of the charter school and its written contracts for, especially, professional employees, to be sure the following subjects have been considered and are either covered by some definitive policy statement or omitted by conscious choice.

_____ 1. Party identification/address/SSN

_____ 2. Status

_____ 3. Duty description

_____ 4. Place of performance

_____ 5. Compensation

- _____ a. Wage, salary, or commission
- _____ b. Overtime
- _____ c. Additional compensation criteria
- _____ d. Bonuses

_____ 6. Employee benefits

- _____ a. Vacations
- _____ b. Holidays
- _____ c. Personal leave
- _____ d. Sick leave
- _____ e. Insurance
  - _____ i. Medical
  - _____ ii. Disability
  - _____ iii. Life
- _____ f. Retirement plan
- _____ g. Other

_____ 7. Expense reimbursement

_____ 8. Outside activity/employment limitations

_____ 9. Confidentiality duties

_____ 10. Noncompetition covenant

_____ a. Time length

_____ b. Geographic limitations

_____ 11. Intellectual Property/Work for Hire provisions

_____ 12. Property return

_____ 13. Duty to notify management of unlawful acts or practices

_____ 14. Certification/Licensure duties

_____ 15. Employment termination

_____ a. With cause

_____ i. Grounds

_____ ii. Process

_____ b. Without cause

_____ i. At-will

_____ ii. Decision maker

_____ c. Resignation effective

_____ i. In writing

_____ ii. On receipt

_____ 16. Grievance/Dispute resolution procedures

_____ 17. Waiver of breach

_____ 18. Severance

_____ 19. Illness, incapacity, or death

_____ 20. Cooperation after retirement or termination

_____ 21. Modification, renewal, or extension

_____ 22. Zipper clause

_____ 23. Saving clause

_____ 24. Applicable law

_____ 25. Date

_____ 26. Signatures

VIII. Selected References

Books

Dale Belman, Morley Gunderson, and Douglas Hyatt, eds., PUBLIC SECTOR EMPLOYMENT IN A TIME OF TRANSITION (IRRA 1996). This research volume issued by the Industrial Relations Research Association reviews trends in different aspects of public sector employment and samples some of the comparative literature on law and practices in other nations.

Kurt H. Decker, THE INDIVIDUAL EMPLOYMENT RIGHTS PRIMER (Baywood 1991). A very basic but accessible introduction to the law of individual rights in the work place. Written from the employee's attorney's point of view.

Adrienne E. Eaton and Jeffery H. Keefe, eds., EMPLOYMENT DISPUTE RESOLUTION AND WORKER RIGHTS (IRRA 1999). The IRRA's long over-due look at the limited empirical literature on employment ADR practices.

Frank Elkouri and Edna Asper Elkouri, RESOLVING DRUG ISSUES BNA 1993). This volume provides the nitty-gritty on dealing with drug abuse in the work place.

Matthew W. Finkin, ed., THE LEGAL FUTURE OF EMPLOYEE REPRESENTATION (ILR Press 1994). A collection of law review articles on new developments in employee representation in the unionized and nonunionized sectors.

James G. Frierson, PREVENTING EMPLOYMENT LAWSUITS: AN EMPLOYER'S GUIDE TO HIRING, DISCIPLINE AND DISCHARGE (BNA 1994). An accessible and professional guide to major theories of liability, preventive practices and legal process.

Marvin Hill and Anthony V. Sinicropi, MANAGEMENT RIGHTS (BNA 1986). A standard reference work for those impacted by collective bargaining.

Henry H.Perritt, WILEY EMPLOYMENT LAW UPDATE (Various dates, John Wiley). Since 1991 Professor Perritt has issued useful annual volumes collecting articles on new developments in employment law.

James R. Redeker, DISCIPLINE: POLICIES AND PROCEDURES (BNA 1983). This is a somewhat dated but still valuable introduction to "just cause" and "progressive discipline" as used in the unionized private sector. The volume catalogues different forms of misconduct and discusses when discipline or discharge has been considered "just." Though not designed for the at-will context or the "tenured" teacher

context, this volume could be very useful as a non-binding set of guidelines or suggestions for managers.

Charles R. Richey, MANUAL ON EMPLOYMENT DISCRIMINATION LAW AND CIVIL RIGHTS ACTIONS IN THE FEDERAL COURTS (West 2nd ed. 1998). Judge Richey's MANUAL gets pulled off the shelf by many federal judges when they are trying to decide a civil rights case involving employment.

Terry Thomason, John F. Burton, Jr., and Douglas Hyatt, eds., NEW APPROACHES TO DISABILITY IN THE WORK PLACE (IRRA 1998). An IRRA research volume on post-ADA developments in dealing with work disability. Primarily for those interested in the empirical literature.

Marvin M. Volz and Edward P. Goggin, eds., ELKOURI AND ELKOURI HOW ARBITRATION WORKS (Committee on ADR in Employment and Labor Law, American Bar Association and BNA 1996). This is *the* standard reference work on arbitration of labor and employment disputes.

Online Resources

The following documents are made available by charter school resource centers or schools. These are only samples and different jurisdictions or circumstances may demand different approaches or language.

General Guidance:

http://www.lqe.org/Resource_Guide/go_organization.htm#Guiding Principles and Helpful Hints: Staff Recruitment and Selection (Illinois Charter School Developers Handbook – Overview of School Organization and Staffing)

http://www.pioneerinstitute.org/csrc/cshb/employ.cfm (Massachusetts Charter School Handbook – Boston Renaissance School Employment Handbook)

http://www.nycharterschools.org/personnel_manual.html (New York Charter School Resource Center – Model Personnel Policy)

http://www.aft.org/research/edisonproject/contract/employee.htm (Edison School – Detailed Individual Employment Contract)

Job Descriptions:

http://bcn.boulder.co.us/univ_school/summit/suteachr.htm (Summit Middle School – teacher job descriptions)

http://www.pioneerinstitute.org/csrc/cshb/principal4.cfm (Massachusetts Charter School Handbook – Barnstable Horace Mann Charter School – curriculum coordinator job description)

Compensation Systems:

http://www.pioneerinstitute.org/csrc/cshb/salary3.cfm (Massachusetts Charter School Handbook – Benjamin Banneker Charter School – longevity and degree based)

http://www.pioneerinstitute.org/csrc/cshb/salary2.cfm (Massachusetts Charter School Handbook – Boston Renaissance Charter School – longevity and degree based, with salary ranges)

http://www.uscharterschools.org/res_dir/res_primary/res_perfpay.htm (Family Learning Center – four-level pay for performance system)

Evaluation forms/processes:

http://www.pioneerinstitute.org/csrc/cshb/evaluation2.cfm (Massachusetts Charter School Handbook – Lynn Community Charter School – evaluation process)

http://www.pioneerinstitute.org/csrc/cshb/evaluation1.cfm (Massachusetts Charter School Handbook – Advantage Schools – evaluation process)